87-1305

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

KOONS FORD OF ANNAPOLIS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

DISTRICT 65, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a negotiated settlement agreement, approved by the National Labor Relations Board without findings of wrongdoing and expressly providing for *no* admission of guilt by the party-employer, nevertheless may serve as the basis for an original finding of "unclean hands" by a court of appeals to support the enforcement of a bargaining order in a separate proceeding?

2. Whether a court of appeals, in enforcing a bargaining order of the National Labor Relations Board, may rely solely on *post hoc* rationalizations, initially propounded by appellate counsel at oral argument, without evaluating the agency's grounds for issuance of the bargaining order?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	3
The May 1984 Findings And Recommendations Of The Administrative Law Judge	3
The Motions To Reopen The Record	4
The December 1986 Decision And Order Of The NLRB	5
The March 1987 Settlement Agreement	5
The Decision Of The Fourth Circuit	6
REASONS WHY THE WRIT SHOULD BE GRANTED	8
Introduction	8
I. The Decision Below Adversely Affects All Settlement Agreements And Creates A Powerful Disincentive To Their Formation	10
A. The Decision Fundamentally Changes Existing Settlement Law	10
B. The Ruling Of The Fourth Circuit Seriously Undercuts The Incentive To Enter And To Honor Settlement Agreements	15
II. The Board's Proper Refusal To Consider The Settled Charges And Complaints Precludes Their *Post Hoc* Resurrection By The Court Of Appeals	18
A. The Fourth Circuit's Reliance On *Post Hoc* Rationalizations Is Completely Contrary To This Court's Pronouncements On The Scope Of Judicial Review	18
CONCLUSION	21

TABLE OF AUTHORITIES

COURT DECISIONS	Page
Bradbury v. Phillips Petroleum Co., 815 F.2d 1356 (10th Cir. 1987)	11
Cassino v. Reichhold Chemicals, Inc., 817 F.2d 1338 (9th Cir. 1987)	14
Chromalloy Mining and Minerals Alaska Division, Chromalloy American Corporation v. NLRB, 620 F.2d 1120 (5th Cir. 1980)	7
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971)	18
City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974)	14
Commissioner of Internal Revenue v. McCoy, 108 S. Ct. 217 (1987)	10
Federal Power Commission v. Texaco, Inc., 417 U.S. 380 (1974)	18
Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985)	18
Fund of Funds, Limited v. First American Fund of Funds, Inc., 274 F. Supp. 517 (S.D.N.Y. 1967)	12
General Steel Products, Inc. v. NLRB, 445 F.2d 1350 (4th Cir. 1971)	7
Gulf States Utilities Co. v. Federal Power Commission, 411 U.S. 747 (1973)	19
Heckler v. Chaney, 470 U.S. 821 (1985)	14, 16
Home Insurance Co. v. Baltimore Warehouse Co., 93 U.S. 527 (1876)	11
In re Bonk, 527 F.2d 120 (7th Cir. 1975)	12
Local 282, International Brotherhood of Teamsters v. NLRB, 339 F.2d 795 (2nd Cir. 1964)	10
Milton S. Kronheim & Co. v. United States, 163 F. Supp. 620 (Ct. Cl. 1958)	11, 16
Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29 (1983)	18
NLRB v. Apple Tree Chevrolet, Inc., 671 F.2d 838 (4th Cir. 1982)	7
NLRB v. Bangor Plastics, Inc., 392 F.2d 772 (6th Cir. 1967)	12

TABLE OF AUTHORITIES—Continued

Page

NLRB v. Food Store Employees, 417 U.S. 1 (1974) 18
NLRB v. Indiana & Michigan Electric Co., 318 U.S. 9 (1943) 13
NLRB v. Knogo Corp., 727 F.2d 55 (2nd Cir. 1984) 7
NLRB v. United Food and Commercial Workers Union, 108 S. Ct. 413 (1987) 10, 15
Peoples Gas System, Inc. v. NLRB, 629 F.2d 35 (D.C. Cir. 1980) 7
Perzinski v. Chevron Chemical Co., 503 F.2d 654 (7th Cir. 1974) 11
S.E.C. v. Chenery Corp., 318 U.S. 80 (1943) 9, 18, 19
South Prairie Construction Co. v. Local No. 627, International Union of Operating Engineers, 425 U.S. 800 (1976) 19
Southwestern Bell Telephone Co. v. NLRB, 667 F.2d 470 (5th Cir. 1982) 14
Sternberger v. United States, 401 F.2d 1012 (Ct. Cl. 1968) 11, 16
U.S. Contractors, Inc. v. NLRB, 697 F.2d 692 (5th Cir. 1983) 14
United States v. Batchelder, 442 U.S. 114 (1979) 14
United States v. Ciambrone, 601 F.2d 616 (2nd Cir. 1979) 12
Wallace Corporation v. NLRB, 323 U.S. 248 (1944) 9, 10, 14, 15
W.B. Johnston Grain Co. v. NLRB, 365 F.2d 582 (10th Cir. 1966) 13, 15
West v. Smith, 101 U.S. 263 (1879) 11

ADMINISTRATIVE DECISIONS

Local 327, International Brotherhood of Teamsters, 160 N.L.R.B. 1919, 63 L.R.R.M. 1208 (1966) 13
Mason & Hanger-Silas Mason Co., 167 N.L.R.B. 894, 63 L.R.R.M. 1208 (1967), *enf'd*, 405 F.2d 1 (5th Cir. 1968) 8, 13

TABLE OF AUTHORITIES—Continued

Page

Poray, Inc., 143 N.L.R.B. 617, 53 L.R.R.M. 1373 (1963), *petition denied*, 337 F.2d 114 (D.C. Cir. 1964) 13

Raymond Buick, Inc., 173 N.L.R.B. 1292, 70 L.R.R.M. 1106 (1968), *modified*, 182 N.L.R.B. 504, 74 L.R.R.M. 1137 (1970), *enf'd*, 445 F.2d 644 (2nd Cir. 1971) 13

Southwest Chevrolet Corp., 194 N.L.R.B. 975, 79 L.R.R.M. 1156, *enf'd*, 82 L.R.R.M. 2620 (7th Cir. 1972) 13

STATUTES, REGULATIONS & RULES

5 U.S.C. § 706 (1982) 18
28 U.S.C. § 1254(1) (1982) 2
28 U.S.C. § 2349 (1982) 6
29 U.S.C. § 158(a) (1) 4
29 U.S.C. § 158(a) (3) 4
29 U.S.C. § 158(a) (5) 4
29 C.F.R. § 101.8 (1987) 12
29 C.F.R. § 101.9 (1987) 6
29 C.F.R. § 101.9(b) (1) (1987) 10
29 C.F.R. § 102.48(d) (1) (1987) 4
Federal Rule of Evidence 408 11

OTHER AUTHORITIES

Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies Final Report, S. Doc. No. 8, 77th Cong., 1st Session (1941) 10

NLRB General Counsel's Report Summarizing Operations in Fiscal 1986, 124 L.R.R. 158 (1987) 10, 15, 16

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DISTRICT 65, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in action No. 87-3801 on October 28, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, No. 87-3801 (4th Cir. October 28, 1987), *reh'g denied*, No. 87-3801 (December 11, 1987),

is unpublished (enforcement ordered at 833 F.2d 310 (4th Cir. 1987)). The final decision of the National Labor Relations Board is reported at 124 L.R.R.M. 1167, 282 N.L.R.B. No. 88 (December 24, 1986). The initial findings and recommendations of the administrative law judge, dated May 30, 1984, are unreported. All three decisions are printed in the separately bound Appendix to this Petition.

The settlement agreement entered by Koons Ford, District 65, United Automobile, Aerospace and Agricultural Implement Workers of America, and the General Counsel of the National Labor Relations Board on March 25, 1987 in a separate agency proceeding; the decision of the National Labor Relations Board approving the settlement agreement; and the *pro forma* judgment of the United States Court of Appeals for the Fourth Circuit enforcing the agency decision, entered in action No. 87-3837 on August 6, 1987, are printed in the Appendix.

JURISDICTION

Koons Ford seeks review of the judgment of the United States Court of Appeals for the Fourth Circuit entered on October 28, 1987. A petition for rehearing and suggestion for rehearing in banc was denied on December 11, 1987, and this Petition is being filed within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, and the National Labor Relations Board's Rules and Regulations and Statement of Procedure, 29 C.F.R. § 101.1 *et seq.*, are set forth in the Appendix to this Petition.

STATEMENT OF THE CASE

On November 24, 1982, District 65, United Automobile, Aerospace and Agricultural Implement Workers of America ("Union"), filed a petition with the National Labor Relations Board ("NLRB" or "Board") seeking an election among a described unit of service department employees of Petitioner Koons Ford of Annapolis, Inc. ("Koons Ford" or "Company"). After a majority of employees voted to reject the Union as their bargaining representative, the Union filed election objections and unfair labor practice charges. On May 30, 1984, an NLRB administrative law judge issued an initial decision finding Koons Ford guilty of certain unfair labor practices. Over two and one-half years later, on December 24, 1986, the Board affirmed, as modified, the findings and recommendations of the administrative law judge, thereby directing Koons Ford to recognize the Union and, upon request, to engage in collective bargaining. On Koons Ford's petition for review of the Board's bargaining order, the United States Court of Appeals for the Fourth Circuit ordered enforcement, holding that Koons Ford could not meet a "clean hands" requirement as a condition for objecting to the bargaining order because of its execution of, and compliance with, a voluntary settlement agreement in a separate NLRB proceeding.

The May 1984 Findings And Recommendations Of The Administrative Law Judge.

On January 12, 1983, thirty-nine out of sixty-six service department employees of Koons Ford [1] voted *not* to select the Union as their bargaining representative. (A-47). Thereafter, on March 14, 1983, upon election objections filed by the Union, a Regional Director of the Board issued a complaint and notice of hearing, alleging Koons Ford had violated Sections 8(a)(1), (a)(3) and

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[1] Koons Ford is engaged in the retail sale and service of automobiles. (A-48).

(a)(5) of the National Labor Relations Act ("Act" or "NLRA"), 29 U.S.C. §§ 158(a)(1), (a)(3), (a)(5), by granting pay raises and by engaging in prohibited conduct against employees in the nature of threats, interrogation and surveillance. (A-47, A-49). On May 30, 1984, after a consolidated hearing on the election objections and the unfair labor practice complaint, the administrative law judge issued a decision finding (1) the Union had obtained a card majority of bargaining unit employees, and (2) the unfair labor practices were sufficient to preclude the possibility of a fair second election. Consequently, the administrative law judge recommended that the election be set aside and that Koons Ford should be ordered to recognize and bargain with the Union. (A-128). Koons Ford filed exceptions to the Board. (A-30).

The Motions To Reopen The Record.

More than three years passed between the close of the agency hearing in October 1983 and the Board's final decision in December 1986. (A-3, A-4). During this period Koons Ford filed with the Board, in accordance with its Rules and Regulations,[2] three separate motions to accept supplemental evidence of dramatically changed circumstances at the Company that would establish the current efficacy of a fair second election among employees in lieu of a bargaining order. (A-4). Specifically, the proffered evidence revealed a complete change in ownership, as well as significant managerial turnover. Moreover, at approximately the time of the Board's decision, there existed a 68.2% turnover in the original bargaining unit such that only twenty-one, or 31.8%, of the "original" sixty-six proposed bargaining unit employees were still employed with the Company. When factoring in the growth of the proposed bargaining unit to ninety-two employees, 77.2% of the employees working in proposed

[2] 29 C.F.R. § 102.48(d)(1) (1987). (A-147).

bargaining unit positions at the time of the Board's order were not employed in unit positions at the time of the election campaign, and did not receive an opportunity to vote on the union representation issue. Moreover, only 10.8% of the then-current unit of employees had actually expressed their desire for union representation through union cards.[3]

The December 1986 Decision And Order Of The NLRB.

On December 24, 1986, the Board issued a final decision and order. The Board determined, *inter alia*, that the former owner and certain managers of Koons Ford had directed threats of plant closure, layoffs and discharge against several employees during the union campaign in December 1982. (A-34-36). Thereafter, the Board found, through examination of authorization cards, that the Union had, at least by December 16, 1982, achieved majority status (A-39 n.17). Refusing to accept the proffered supplemental evidence of owner, managerial and employee turnover in Koons Ford's three motions to reopen the record (A-40 n.18), the Board, on the basis of a hearing record that closed over three years earlier, directed Koons Ford to recognize the Union and, upon request, to engage in collective bargaining. (A-42).

The March 1987 Settlement Agreement.

In March 1987, in a separate Board proceeding, Koons Ford, the Union and the General Counsel of the NLRB settled certain unfair labor practice charges filed against the Company between December 1985 and May 1986.[4] Subsequent to the completion of a lengthy and vigorously contested hearing, yet prior to the submission of briefs

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[3] *See* Third Motion to Reopen the Record for the Receipt of Supplemental Evidence, *Koons Ford of Annapolis, Inc.*, Nos. 5-CA-15050, 5-RC-11899 (November 7, 1986).

[4] *Koons Ford of Annapolis, Inc.*, Nos. 5-CA-17683, 5-CA-17917 and 5-CA-17933, *enf'd*, No. 87-3837 (4th Cir. 1987).

or a ruling by the administrative law judge, the parties entered into a formal Settlement Stipulation ("Agreement") pursuant to the Board's Rules and Regulations.[5] The Agreement, containing no findings of guilt, incorporates a negotiated "nonadmissions clause" such that it was expressly understood among the parties that by entering into the Agreement Koons Ford did not admit to violating the Act. (A-13).

The Agreement received the required approval of the Board and the administrative law judge,[6] who noted the Agreement would "result in the accelerated restoration of harmony between [Koons Ford] and the [Union], and [would] conserve the resources of all parties and the Board in reviewing a transcript in excess of 4100 pages and the preparation of briefs and decisions."[7] The Board's order, consistent with the nonadmissions clause in the Agreement, does not contain any findings that Koons Ford violated the Act. (A-19). Koons Ford complied fully with the terms of the Agreement upon its approval by the Board.[8]

The Decision Of The Fourth Circuit.

In enforcing the bargaining order of the NLRB,[9] the Court of Appeals failed to resolve the crucial issue presented for review that, as a legal matter, in refusing to consider properly the passage of time and changed cir-

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[5] Settlements obtained after the issuance of a complaint are governed by 29 C.F.R. § 101.9. (A-143).

[6] *See* 29 C.F.R. § 101.9. (A-143).

[7] Recommendation of Approval of Formal Settlement (April 8, 1987). (A-15-16).

[8] The Agreement, through the Board's order, was subsequently enforced in a *pro forma* proceeding by the United States Court of Appeals for the Fourth Circuit on August 6, 1987. (A-28).

[9] The jurisdiction of the Court of Appeals was invoked pursuant to 28 U.S.C. § 2349 (1982).

cumstances reflecting owner, managerial and employee turnover, the Board failed to make a reasoned analysis of the propriety of a bargaining order.[10] (A-4, A-5). The Fourth Circuit recognized that "[t]he alleged changes in ownership and management involve[d] unresolved questions of fact."[11] (A-5 n.1). It further briefly discussed apposite Fourth Circuit authority wherein that court "refused to enforce a bargaining order when the Board had failed to consider substantial changes in ownership and management, as well as high employee turnover."[12] (A-4). Nevertheless, after finding the Board had not addressed the issue of the turnover in ownership and management, the Fourth Circuit

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[10] Koons Ford also appealed the Board's findings on (1) the union majority based on authorization cards, and (2) the conferral of economic benefits for unlawful purposes. The Fourth Circuit failed to address these issues.

The Center on National Labor Policy, Inc., representing a bargaining unit majority of fifty-three Koons Ford employees, filed a brief *amicus curiae* and argued orally in the Fourth Circuit in support of Koons Ford and in opposition to the bargaining order.

[11] Specifically, the Court of Appeals determined there were unresolved questions concerning, *inter alia*, (1) whether there was really a change in ownership for purposes of a bargaining order; (2) the termination prior to the election of a manager who committed unfair labor practices and the impact of that discharge on the violations; (3) the implications resulting from the fact that a senior manager may not have committed any "hallmark" violations; and (4) whether another manager guilty of certain violations may occupy too low a level to poison the atmosphere and render a fair second election unlikely. (A-5 n.1).

[12] *See NLRB v. Apple Tree Chevrolet, Inc.*, 671 F.2d 838, 841-42 (4th Cir. 1982) (*Apple Tree* II); *General Steel Products, Inc. v. NLRB*, 445 F.2d 1350, 1356 n.8 (4th Cir. 1971) (*General Steel* II); *see also NLRB v. Knogo Corp.*, 727 F.2d 55, 60 (2d Cir. 1984); *Chromalloy Mining and Minerals Alaska Division, Chromalloy American Corporation v. NLRB*, 620 F.2d 1120, 1133 (5th Cir. 1980); *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35, 46 (D.C. Cir. 1980).

refused to decide whether the Board was obliged to do so prior to issuing a bargaining order. (A-5).

In declining to rule on the issues presented for review, the Court of Appeals relied on appellate Board counsel's contentions concerning the settled Board proceeding—first raised at oral argument—in enforcing the NLRB bargaining order. (A-6). Specifically, the Court of Appeals failed to examine the bases propounded by the Board for the issuance of the bargaining order. Instead, the Fourth Circuit enforced the Board's bargaining order after finding that Koons Ford "obvious[ly] . . . cannot meet the 'clean hands' requirement as a condition for objecting to the bargaining order" because of its execution of, and compliance with, a voluntary settlement agreement in another NLRB proceeding. (A-6). The Court of Appeals concluded, "It would be . . . a waste of judicial time to remand this cause to the Board to consider the 'clean hands' issue." (A-6).

REASONS WHY THE WRIT SHOULD BE GRANTED

Introduction

This petition presents two extremely important questions for review. The first question presented here—the imputability of "unclean hands" against a party to a Board-approved settlement agreement with a nonadmissions clause—has not yet been addressed specifically by this Court.[13] The resolution offered by the Fourth Circuit dramatically changes well-established principles underlying settlement agreements in a manner that absolutely cannot be reconciled with this Court's and other courts of appeals' decisions.

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[13] "Nonadmissions clauses" are regularly included in NLRB settlement agreements in order to promote the expeditious settlement of labor disputes. *See Mason & Hanger-Silas Mason Co.*, 167 N.L.R.B. 894 n.1, 63 L.R.R.M. 1208 (1967), *enf'd*, 405 F.2d 1 (5th Cir. 1968).

The determination of the Court below that the execution of, and compliance with, a voluntary settlement agreement is essentially equivalent to an unqualified admission of guilt is wholly inconsistent with the traditional understanding of settlements. The significance of Board-sanctioned settlement agreements as an efficient law enforcement mechanism was recognized by this Court over forty years ago in its *Wallace* [14] decision. Since then, it has been the policy of the courts and the Board to favor such settlements and, consistent with this judicial policy, no admissions of guilt are to be imputed on account of settlement. If allowed to stand, the Fourth Circuit's decision in this case will permit serious erosion of this well-recognized precept.

The second question presented here—whether the Fourth Circuit engaged in patently improper, expansive review by adopting *post hoc* rationalizations of counsel in lieu of evaluating the decisional bases articulated by the Board—virtually compels relief by this Court. Under this Court's well-recognized *Chenery* [15] decision, an appellate court is restricted to an analysis of the agency's reasons for issuing the order. Foregoing ruling on the issues presented for review, the Fourth Circuit relied merely on appellate counsel's *post hoc* oral recitation of unfair labor practice charges and complaints from a separate settled proceeding, but which charges and complaints were never considered by the Board. That method of review constitutes a direct departure from this Court's many pronouncements on the scope of judicial analysis of agency orders. Such improper review must not be permitted to stand.

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[14] *Wallace Corp. v. NLRB*, 323 U.S. 248, 253-54 (1944) (recognizing the Board's working rule to respect the terms of a settlement agreement approved by it, going behind such settlement only when the adjustment effort has failed or where there has been a subsequent unfair labor practice).

[15] *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

I. The Decision Below Adversely Affects All Settlement Agreements And Creates A Powerful Disincentive To Their Formation.

It is without cavil that settlement agreements are the preferred method of resolving disputes—the " 'lifeblood' of the administrative process, especially in labor relations." [16] In fiscal year 1986 alone the Board obtained an unfair labor practice settlement rate of nearly ninety-two percent.[17] Such a basic reversal of the traditional understanding of settlements as that proposed by the Fourth Circuit, however, will necessarily have far-ranging effects, adding tremendously to the workload of administrative agencies.

A. The Decision Fundamentally Changes Existing Settlement Law.

The Fourth Circuit's unpublished ruling [18] reading into settlement agreements [19] imputed admissions of guilt is

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[16] *NLRB v. United Food and Commercial Workers Union*, 108 S. Ct. 413, 423 (1987) (quoting Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies Final Report, S. Doc. No. 8, 77th Cong., 1st Sess., 35 (1941)).

From its inception the Board has encouraged compromise and settlement. "The purpose of such . . . settlements has been to end labor disputes, and so far as possible to extinguish all the elements giving rise to them. *Wallace Corporation v. NLRB*, 323 U.S. 248, 254 (1944); *see Local 282, International Brotherhood of Teamsters v. NLRB*, 339 F.2d 795, 797 (2d Cir. 1964).

[17] NLRB General Counsel's Report Summarizing Operations in Fiscal 1986, 124 L.R.R. 158, 160 (1987).

[18] The fact that the challenged Fourth Circuit order is unpublished should carry no weight in the Court's decision to review the case. *See Commissioner of Internal Revenue v. McCoy*, 108 S. Ct. 217, 219 (1987).

[19] Due to the frequency of settlement agreements, the Board's implementing regulations provide specific procedural guidance:

> After the issuance of a complaint, the Agency favors a formal settlement agreement, which is subject to the approval of the

flatly contrary to the well-established practice throughout the federal courts that proposed or accepted compromises are not admissible as evidence of an admission of the validity or invalidity of the underlying claim or amount of damage. *See West v. Smith*, 101 U.S. 263, 272-73 (1879); *Home Insurance Co. v. Baltimore Warehouse Co.*, 93 U.S. 527, 548 (1876); *Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356, 1363-64 (10th Cir. 1987); Fed. R. Evid. 408.[20] "The policy rationale which excludes an offer of settlement arises from the fact that the law favors settlements of controversies and if an offer of a dollar amount by way of compromise were to be taken as an admission of liability, voluntary efforts at settlement would be chilled." *Perzinski v. Chevron Chemical Co.*, 503 F.2d 654, 658 (7th Cir. 1974); *see* Fed. R. Evid. 408 advisory committee note. Moreover, it is recognized that offers of settlement indicate merely a desire for peace, not an admission of liability. *See Sternberger v. United States*, 401 F.2d 1012, 1018 (Ct. Cl. 1968); *see also Milton S. Kronheim & Co. v. United States*, 163 F. Supp. 620, 628 (Ct. Cl. 1958) ("[I]t is often more advantageous, economical and desirable for a party to 'buy his peace' than to go through litigation even when his chances of eventually prevailing are great."); Fed. R. Evid. 408 advisory committee note.

> Board in Washington, D.C. . . . . Ordinarily, the formal settlement agreement also contains the respondent's consent to the Board's application for the entry of a judgment by the appropriate circuit court of appeals enforcing the Board's order.

29 C.F.R. § 101.9(b)(1)(1987) (A-144). It is precisely this "favored" settlement procedure that the parties followed in the proceeding referred to by the Court of Appeals. (A-6).

[20] Federal Rule of Evidence 408 provides, in relevant part: "Evidence of . . . accepting . . . a valuable consideration in compromising . . . a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount."

The general rule against an inference of guilt or "unclean hands" from the existence of a compromise agreement prevails when applied to NLRB and other[21] agency settlements. In contrast to the holding below, the Sixth and Tenth Circuits recognize that a settlement agreement differs from a finding by the Board that an unfair labor practice has been committed and is not an admission of past liability.[22] *See NLRB v. Bangor Plastics,*

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[21] For example, in *Fund of Funds, Limited v. First American Fund of Funds, Inc.*, 274 F. Supp. 517 (S.D.N.Y. 1967), at the time plaintiff commenced the action to enjoin defendant from using its common law trade name, it was also the subject of proceedings before the Securities Exchange Commission, which were later settled. The court stated:

> Consequently, when this action was commenced . . . it appears that plaintiffs may have been susceptible to the charge that they had come into equity with unclean hands. The S.E.C.'s Order of Settlement, however, made no findings. Since . . . plaintiffs have settled any disagreements they had with [the] S.E.C. respecting S.E.C.'s jurisdiction over their activities in this country, the doctrine of unclean hands should not be applied. . . .

Id. at 519 n.1. Similarly, Koons Ford has settled any disagreements it had with the NLRB and the Union without any findings of liability, and under the reasoning of *Fund of Funds, Limited*, such settlement should not serve as a basis for a current finding of unclean hands.

[22] The issuance of a complaint by the Board is analogous to a Grand Jury indictment, the former being issued when it "appears" that a charge has merit, *see* 29 C.F.R. § 101.8 (1987) (A-143), and the latter being handed down upon probable cause that the accused committed a criminal act. *See In re Bonk*, 527 F.2d 120, 126 (7th Cir. 1975). As a criminal indictment may not be considered as evidence of guilt, *United States v. Ciambrone*, 601 F.2d 616, 622 (2d Cir. 1979), so the mere issuance of a complaint cannot raise an inference of liability or unclean hands. *See NLRB v. Bangor Plastics, Inc.*, 392 F.2d 772, 775 (6th Cir. 1967) ("Thus, [subsequent to the issuance of the complaint, yet prior to an ALJ ruling on the merits,] there has been no adjudicatory finding of an unfair labor practice, nor can one be read into the settlement

Inc., 392 F.2d 772, 775 (6th Cir. 1967) ("A settlement agreement does not amount to a finding or admission that respondent has committed an unfair labor practice. . . . The Board concedes that such agreements are most often prompted by a desire to reach an amicable disposition of the matter without the need for expensive and time-consuming hearings and court review."); *W. B. Johnston Grain Co. v. NLRB*, 365 F.2d 582, 587 (10th Cir. 1966) ("It is true that the settlement agreement was not an admission that the Company had been guilty of an unfair labor practice . . . .").

Indeed, and contrary to the interpretation of the Fourth Circuit, Board decisions on the evidentiary effect of settlements uniformly strive to preserve the integrity of the agreements where honored by the settling parties to encourage stipulated settlements. The Board has held often in unfair labor practice cases that a settlement agreement entered into with the same party is not evidence of underlying guilt or of that party's proclivity to violate the Act. *See Raymond Buick, Inc.*, 173 N.L.R.B. 1292, 1293, 70 L.R.R.M. 1106, 1108 (1968), *modified*, 182 N.L.R.B. 504, 74 L.R.R.M. 1137 (1970), *enf'd*, 445 F.2d 644 (2d Cir. 1971); *Mason & Hanger-Silas Mason Co.*, 167 N.L.R.B. 894 n.1, 63 L.R.R.M. 1208 (1967), *enf'd*, 405 F.2d 1 (5th Cir. 1968); *Local 327, International Brotherhood of Teamsters*, 160 N.L.R.B. 1919, 1920, 63 L.R.R.M. 1208, 1209 (1966). Moreover, a settlement agreement is not competent evidence that an employer bears antiunion animus. *See Southwest Chevrolet Corp.*, 194 N.L.R.B. 975, 79 L.R.R.M. 1156, 1158-59, *enf'd*, 82 L.R.R.M. 2620 (7th Cir. 1972); *Mason & Hanger-Silas Mason Co.*, 167 N.L.R.B. at 894 n.1; *Poray*,

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agreement."); *cf. NLRB v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 18 (1943) (the charge is not proof of the commission of an unfair labor practice).

Inc., 143 N.L.R.B. 617, 620, 53 L.R.R.M. 1373, 1374-75 (1963), *petition denied*, 337 F.2d 114 (D.C. Cir. 1964).

In a further effort to maintain the viability of settlement agreements, where a charged party complies with the agreement and does not engage in post-settlement unfair labor practices, as in the instant case, the NLRB, pursuant to established policy, will not predicate other findings of unlawful conduct on presettlement activity.[23] *See Wallace Corp.*, 323 U.S. at 253-54; *U.S. Contractors, Inc. v. NLRB*, 697 F.2d 692, 695-97 (5th Cir. 1983); *Southwestern Bell Telephone Co. v. NLRB*, 667 F.2d 470, 475 (5th Cir. 1982).

In sum, the Fourth Circuit's radical interpretation of the Agreement, imputing guilt or "unclean hands" to Koons Ford, is completely at odds with authority from this Court, other circuit courts,[24] and the Board itself. Moreover, as will be shown, the lower court's interpretation creates a major disincentive to the formation of settlement agreements.

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[23] Moreover, it is well-recognized in this Court that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to the agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *see United States v. Batchelder*, 442 U.S. 114, 123-24 (1979). The unsuitability of such agency enforcement decisions for judicial review stems in large part from the complex series of factors, discussed *infra* at 16, balanced in arriving at a decision on settlement. *See Heckler*, 470 U.S. at 831.

[24] *See, e.g., Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1342 (9th Cir. 1987) (offers to settle Age Discrimination Employment Act charges inadmissible to prove liability); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 459-60 (2d Cir. 1974) (claim for attorneys' fees under Section 4 of the Clayton Act must fail where action settled and awarding of fees "would be tantamount to a judicial assumption that settlement negotiations were predicated on defendants' admission of guilt. Such an assumption is contrary to the basic principles which underlie settlements.")

B. The Ruling Of The Fourth Circuit Seriously Undercuts The Incentive To Enter And To Honor Settlement Agreements.

In inferring *post hoc* an unqualified admission of guilt from the settlement, the Fourth Circuit has defeated the Agreement's purpose to end the labor dispute and to extinguish all the elements giving rise to it.[25] Where the settlement of a disputed or dubious claim is construed to constitute an admission of guilt on the part of the charged party, notwithstanding the arms-length negotiation of a nonadmissions clause, such party can never safely settle any doubtful complaint and, in order to be secure, will be forced to litigate all complaints fully, markedly reducing the frequency of settlements. Moreover, the Fourth Circuit's ruling creates an atmosphere wherein a charged party would have an incentive not to honor its part of the bargain, recognizing that, regardless of its commitment, the agreement may inevitably be deemed an admission of guilt in some future proceeding. *See Food and Commercial Workers Union*, 108 S. Ct. at 425.

The implications of the Fourth Circuit's decision for the Board and its enforcement of the Act are most serious. "The Agency's effectiveness and efficiency in administering the Act is greatly enhanced by its ability to effect a voluntary resolution of meritorious unfair labor practice cases." NLRB General Counsel's Report, 124 L.R.R. at 160.[26] In 1985 the Board obtained 8,988 agreements representing a 94.4% settlement rate. For 1986 the figures are equally substantial: 9,312 settlements of unfair labor practice cases representing a rate

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[25] *Wallace Corp.*, 323 U.S. at 253-54.

[26] *See also W. B. Johnston Grain Company*, 365 F.2d at 586 (a large majority of the Board's cases is disposed of by settlement agreements; without them, "the administration of the Act by the Board would be greatly impaired, due to the overwhelming load of cases").

of 91.7%. *Id.* The threat created by the Fourth Circuit's decision to the "lifeblood" of the administrative process is very real and certainly inconsistent with this Court's pronouncements favoring settlements.

The approach of the Fourth Circuit also inflicts real injustice on settlement participants, as well illustrated by Koons Ford's experience before the Board and the Fourth Circuit. Following a lengthy hearing on the merits in the settled case, Koons Ford, General Counsel for the Board and the Union entered into settlement negotiations prior to briefing and a ruling from the administrative law judge. (A-6, A-16). For its part, Koons Ford, consistently asserting its innnocence [27], entered into a settlement with the Board merely to establish peace in its facility and to avoid further costly and protracted litigation—not unlike many settlement participants.[28] (A-16). The General Counsel, on the other hand, engaged in a complicated balancing of factors considering the agency's resource allocation, the strength of the evidence adduced at the hearing, the seriousness of the offense, the likelihood of its repetition, and the willingness of the charged party to settle.[29] The Agreement received the approval of the presiding administrative law judge and the Board. (A-15, A-19).

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[27] Paragraph 9 of the Agreement provides: "It is expressly understood that by entering this Stipulation, [Koons Ford] does not admit it violated the National Labor Relations Act, as amended." (A-13). *See also* Recommendation of Approval of Formal Settlement, *Koons Ford of Annapolis, Inc.*, 5-CA-17863, 5-CA-17917, 5-CA-17933 (April 8, 1987) (A-16).

[28] *See Sternberger*, 401 F.2d at 1018; *Milton S. Kronheim Co.*, 163 F. Supp. at 628.

[29] *See Heckler*, 470 U.S. at 831-32; *see also* Petition of the NLRB for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit at 16-17, *NLRB v. United Food and Commercial Workers Union*, 108 S. Ct. 413 (1987) (relating factors considered by the Board in settling a complaint).

Despite the extensive agency deliberations in the settled case, the Fourth Circuit has now held that it may ignore the reasoned decision of the NLRB to settle, violate agency practice regarding honored settlements, and pierce the Agreement containing a negotiated nonadmissions clause to find Koons Ford essentially guilty of the underlying charges where the administrative law judge and the Board did not. It is hard to imagine a more unjust or unexpected application of the Agreement than for the Court of Appeals to strip the parties of control of their negotiated settlement and use it as evidence of guilt in the bargaining order case against an unsuspecting settlement participant such as Koons Ford.[30] Moreover, the General Counsel's ability to secure settlement depends substantially on her ability to assure the charged party that the matter will not be revisited by the Board or courts (absent a breach of the stipulation). Unless this Court intervenes, every settlement defendant runs the risk that someday its agreement will be raised in some unforeseen action as evidence of prior guilt and current "unclean hands."

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[30] At the urging of the administrative law judge shortly after issuance of the Board's final bargaining order on December 24, 1986, the parties considered the utility of settling the separate agency proceeding with the recognition that the Board's final bargaining order, if enforced, would fix the relationship between Koons Ford and the Union. *See* Motion of Respondent, Koons Ford of Annapolis, Inc., To Extend Time For Filing Post-Hearing Briefs, *Koons Ford of Annapolis, Inc.*, Nos. 5-CA-17683, 5-CA-17770, 5-CA-17917 and 5-CA-17933 (filed January 6, 1987) (A-137-140). Thus, the Fourth Circuit's reliance on Koons Ford's execution of the Agreement as the basis for enforcing the bargaining order is an egregious example of the "tail wagging the dog." It is to protect against such unforseeable anomalous results that federal courts and the Board traditionally have respected settlement agreements and refused to infer guilt therefrom in other proceedings.

II. The Board's Proper Refusal To Consider The Settled Charges And Complaints Precludes Their *Post Hoc* Resurrection By The Court Of Appeals.

This Court previously observed in its *Chenery* ruling that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." [31] It is inexplicable, therefore, that the Court of Appeals would so blatantly exceed the scope of judicial review, invade the province of the Board, and rule on the implications of a settlement agreement from a separate proceeding.

A. The Fourth Circuit's Reliance On *Post Hoc* Rationalizations Is Completely Contrary To This Court's Pronouncements On The Scope Of Judicial Review.

The ruling of the Fourth Circuit, that a settlement agreement obtained in a separate proceeding may serve as *post hoc* support to enforce the Board's bargaining order, constitutes a direct departure from established law that an agency's action must be upheld, if at all, on the basis articulated by the agency itself. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 50 (1983); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971); *Chenery Corp.*, 318 U.S. at 87. More specifically, *post hoc* rationalizations first offered by the Board's appellate counsel are an improper basis for a court of appeals to uphold an agency's action. *Federal Power Commission v. Texaco, Inc.*, 417 U.S. 380, 397 (1974), *NLRB v. Food Store Employees*, 417 U.S. 1, 9 (1974). Essentially, the assertions of appellate counsel do not constitute the "whole record" compiled by the agency, the basis for review required by § 706 of the Administrative Procedure Act. *See Overton Park*, 401 U.S. at 419; (A-142). As such, a court of appeals

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[31] *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

may not "supply an alternative unstated ground to support an agency's decision if that ground is one that 'the agency alone is authorized to make.'" [32] *Gulf States Utilities Co. v. Federal Power Commission*, 411 U.S. 747, 764 (1973) (quoting *Chenery*).

The Fourth Circuit, in enforcing the Board's order, abrogated all of this Court's restrictions on the scope of judicial review. In the face of *Chenery*, the Court of Appeals adopted appellate counsel's rationalizations first raised "[d]uring argument in [the] [c]ourt" (A-6), and never mentioned by the Board in its decision. Such casual disregard for the scope of judicial review must not be allowed to stand if agency decisionmaking is to have any significance.

Compounding the *Chenery* error is the Fourth Circuit's incorrect analysis of the settlement record. As a basis for its finding of unclean hands, the Court of Appeals incorrectly found that "unfair labor practice charges had been filed against Koons Ford *after* the Board issued its order in this proceeding." (A-6) (emphasis added). The record of the settled case, however, reveals that the charges and complaints that were the subject of the Agreement were issued originally between December 1985 and May 1986—well *before* the Board's bargaining order of December 24, 1986. (A-7, A-8). No new charges were issued against Koons Ford subsequent to the Board's bargaining order in this proceeding.[33]

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[32] Indeed, assuming *arguendo* some inference may be derived from the fact of settlement, it is for the Board and not the appellate court to determine what that inference is. *See South Prairie Construction Co. v. Local No. 627, International Union of Operating Engineers*, 425 U.S. 800, 805-06 (1976) (determination of bargaining unit question by court of appeals upon review of NLRB decision held improper where Board had not passed on the question).

[33] Review of the record reveals merely a two-step technical process of settlement: first, "for the purpose of enabling the parties . . .

This material factual error is significant insofar as the Fourth Circuit based its findings of "unclean hands" on these "new" charges. (A-6). Presumably, under the lower court's reasoning, if these charges and complaints had been before the Board when it issued its bargaining order decision in December 1986, inevitably the Board would have found that no fair second election was possible in light of the "new" charges. As such, in the view of the Fourth Circuit, a remand to give the Board an opportunity to cure the deficiencies in its analysis raised by Koons Ford concerning changed circumstances would have been "a waste of judicial time." (A-6). In fact, the charges and complaints were issued, and the hearing completed, well *before* the Board's decision. The Board, however, correctly did not refer to, or otherwise rely on, those proceedings in issuing its bargaining order.[34] The Fourth Circuit's material factual error, therefore, undercuts completely both the finding of "unclean hands" and the consequent determination that remand would be a waste of judicial resources.

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to settle [the] cases," it was necessary to sever the charges for settlement in the previously consolidated case; second, amended complaints incorporating the same charges were issued. *See* Order, *Koons Ford of Annapolis, Inc.*, No. 5-CA-17683 (Mar. 2, 1987) (A-134-135).

[34] In fact, the Board neither briefed nor argued to the Fourth Circuit that the mere referral to the existence of, and compliance with, the Agreement is a proper basis upon which to deny the petition for review and grant enforcement of the bargaining order.

CONCLUSION

For the reasons stated herein, Koons Ford of Annapolis, Inc. respectfully requests this Court to issue a writ of certiorari to review the decision of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Supreme Court, U.S.
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CLERK

87-1805

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

KOONS FORD OF ANNAPOLIS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

DISTRICT 65, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

		Page
1.	Decision of the United States Court of Appeals for the Fourth Circuit, No. 87-3801 (October 28, 1987)	A-1
2.	Settlement Stipulation, *Koons Ford of Annapolis, Inc.*, No. 5-CA-17683 (March 1987)	A-7
3.	Recommendation of Approval of Formal Settlement (by the administrative law judge), *Koons Ford of Annapolis, Inc.*, 5-CA-17683, 5-CA-17917, 5-CA-17933 (April 8, 1987)	A-15
4.	Decision and Order of the National Labor Relations Board (approving settlement stipulation), *Koons Ford of Annapolis, Inc.*, 5-CA-17683, 5-CA-17917, 5-CA-17933 (May 28, 1987)	A-19
5.	Judgment (of the Court of Appeals enforcing order of N.L.R.B. approving settlement stipulation), No. 87-3837 (August 6, 1987)	A-28
6.	Decision and Order of the National Labor Relations Board, *Koons Ford of Annapolis, Inc.*, 124 L.R.R.M. 1167, 282 N.L.R.B. No. 88 (December 24, 1986)	A-30
7.	Decision (of the administrative law judge), *Koons Ford of Annapolis, Inc.*, Nos. 5-CA-15050, 5-RC-11899 (May 30, 1984)	A-46
8.	Order (of the administrative law judge severing cases) Nos. 5-CA-17683, 5-CA-17770, 5-CA-17917, and 5-CA-17933 (March 2, 1987)	A-134
9.	Order (of the Court of Appeals denying petition for rehearing and suggestion for rehearing in banc), No. 87-3801 (December 11, 1987)	A-136
10.	Motion of Respondent, Koons Ford of Annapolis, Inc., To Extend Time for Filing Briefs, *Koons Ford of Annapolis, Inc.*, Nos. 5-CA-17083, 5-CA-17770, 5-CA-17917, 5-CA-17933 (January 6, 1987)	A-137
11.	Relevant Statutory and Regulatory Provisions	A-142

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-3801

KOONS FORD OF ANNAPOLIS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

DISTRICT 65, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA, AFL-CIO;
Intervenor

THE CENTER ON NATIONAL LABOR POLICY,
Amicus Curiae

On Petition for Review and Cross-Application
for Enforcement of an Order of the
National Labor Relations Board

Argued: June 3, 1987 Decided: October 28, 1987

Before WINTER, Chief Judge, and RUSSELL and WIDENER, Circuit Judges.

Robert Elton Campbell (Christopher Capuano; Donovan, Leisure, Newton & Irvine on brief) for Petitioner; Michael Ernest Avakian (Terran W. Mast, Center on National Labor Policy, Inc. on brief) for Amicus Curiae Center on National Labor Policy, Inc.; Karen R. Cordry, National Labor Relations Board (Rosemary M. Collyer, General Counsel; John E. Higgins, Deputy General Counsel; Robert E. Allen, Associate General Counsel; Elliott Moore, Deputy Associate General Counsel; W. Christian Schumann, Supervisory Attorney; Sandra S. Elligers, John H. Ferguson; Marion L. Griffin; Victoria A. Higman; Joseph A. Oertel on brief) for Respondent; (Ellen F. Moss on brief) for District 65, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO.

PER CURIAM:

This case concerns an order of the National Labor Relations Board (Board) directing Koons Ford of Annapolis, Inc. (Koons Ford) to recognize and bargain with District 65, United Automobile, Aerospace and Agricultural Implement Workers of America (Union) as the collective bargaining agent for all service department employees. We grant enforcement.

I.

The Union began organizing the service department employees at Koons Ford in September 1982. By November 24, 1982, a majority of the employees (32 out of 62) had signed "single purpose" authorization cards by which they accepted membership in the Union and authorized it to bargain on their behalf. Additional employees signed authorization cards in the following weeks. When the election was held on January 12, 1983, however, only 27 of the 66 eligible employees voted to be represented by the Union. The Union filed objections to the election and also filed unfair labor practices charges.

Following consolidation of the election objections and unfair labor practices charges, an administrative law judge (ALJ) held a hearing from June 6, 1983, to October 18, 1983. On May 30, 1984, the ALJ issued his opinion, concluding that Koons Ford had violated sections 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, by engaging in the following prohibited conduct: (1) Six days before the representation election Koons Ford discriminatorily granted wage increases and bonuses to its employees to discourage support for the Union. (2) Six days before the representation election Koons Ford settled a long-standing employee grievance about the computation of wage rates to discourage support for the Union. (3) Between November 1982 and January 1983 Koons Ford, through its chief manager John Koons, Jr., and three other managers, threatened employees with plant closure, loss of employment, and other reprisals if they chose the Union as their bargaining agent. (4) During this same time period these Koons Ford managers coercively interrogated employees regarding their union activity and the activities of others, and solicited employees to engage in anti-Union activity. In total, the ALJ found approximately 26 instances of unlawful conduct by John Koons, Jr., and the three other managers.

The ALJ issued a cease-and-desist order and set aside the election. He then considered the propriety of issuing a bargaining order pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The ALJ determined that Koons Ford's violations had been severe and that they were the kind of violations that would not quickly dissipate. He then concluded that there was little likelihood of a free and fair second election, and that the employees' sentiment was best expressed through the authorization cards. He therefore ordered Koons Ford to recognize and bargain with the Union.

Koons Ford excepted to the ALJ's decision and filed three separate motions to reopen the record for receipt of supplemental evidence regarding turnover in Koons Ford's ownership, management, and employees that had occurred after the hearings. On December 24, 1986, the Board denied the motions to reopen and affirmed the ALJ's order with slight modifications in the findings of fact. Koons Ford then petitioned for review, and the Board petitioned for enforcement.

II.

Koons Ford alleges that the Board must consider the appropriateness of a bargaining order at the time it is issued, and that the Board thus had an obligation to reopen the record to receive evidence of large-scale employee turnover, a change in ownership, and the departure of offending managers. All of these changes occurred after the hearing and most of them occurred after the ALJ filed his decision.

As support for its proposition, Koons Ford quotes from this court's opinion in *General Steel Products, Inc. v. NLRB*, 445 F.2d 1356 n.8 (4th Cir. 1971) (*General Steel II*), in which the court refused to enforce a bargaining order when the Board had failed to consider substantial changes in ownership and management, as well as high employee turnover.

> More than employee turnover is involved here. There was a proffer to prove a complete change in ownership and management with a resultant departure by resignation, discharge or demotion, of the perpetrators of the unfair practices. The change, whether effected before or after the unfair labor practice hearing, materially altered the situation and should be considered by the Board on remand, in light of the principles stated in Gissel. . . .

See also NLRB v. Apple Tree Chevrolet, Inc., 671 F.2d 838 (4th Cir. 1982) (*Apple Tree II*) (refusing to en-

force bargaining order after Board failed to hold hearing to consider changes in management as well as high employee turnover).

The Board contends that under the principle of finality, it was not required to reopen the record to consider post-hearing evidence of changed circumstances. The Board further argues that it actually *did* consider this evidence: the Board's opinion explicitly states that the evidence sought to be adduced by Koons Ford would not require a different result. A review of the Board's opinion shows that it explained why the high employee turnover would not change its decision, but it did not expressly address the turnover in ownership or management.[1]

Without resolving this issue, we note that a bargaining order is in the nature of an equitable remedy. Once the ALJ has issued a bargaining order, the employer who seeks to reverse that order must have clean hands. If the employer continues to act with disdain or disregard for this country's labor laws, he presents the most cogent possible evidence that there could not be a free and fair second election, and that a bargaining order would best reflect the employees' sentiment. Only if the employer has clean hands can there be any reason to look at

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[1] The alleged changes in ownership and management involve unresolved questions of fact. The new sole owner of Koons Ford is Joseph Koons, a brother of former chief manager John Koons, Jr. Because Joseph Koons and John Koons, Jr., had both been part owners of Koons Ford (through a four-member family partnership) at the time of the unfair labor practices, there is a question as to whether there was really a change in ownership for purposes of a *Gissel* bargaining order. Similarly, there is a question concerning the change from John Koons, Jr., to Joseph Koons as the chief manager. Finally, questions remain about the other three managers who committed unfair labor practices. One of these managers (Tomarchio) was terminated before the election. Another of the managers (Hendrick) may not have committed any hallmark violations. And the third manager (Sherbert) may be at too low a level to poison the atmosphere and render a fair second election unlikely.

changed circumstances and determine whether they should affect the enforcement of the bargaining order.

During argument in this Court, it was brought to our attention that unfair labor practices charges had been filed against Koons Ford after the Board issued its order in this proceeding. These charges were disposed of by a settlement stipulation providing for the entry of a Board Order and a Court Judgment enforcing that order. In the settlement stipulation Koons Ford did not admit violating the Act but it consented to an extensive order requiring compliance with the Act and providing for full and immediate reinstatement, and for any loss of earnings or other benefits suffered by reason of the discharging of three specific complainants in the proceeding. That settlement stipulation came up on the petition for enforcement by the Board to us, and we have ordered enforcement. We, therefore, have before us as a part of the records of this Court the records of that proceeding. It is established that we may refer to records of our own court in litigation between the same parties in reviewing another appeal between those parties where the other record is relevant to the pending proceedings. *Jacques v. United States R.R. Retirement Bd.*, 736 F. 2d 34, 40 (2d Cir. 1984); *Harrington v. Vandalia-Butler Bd. of Ed.*, 649 F. 2d 434, 441 (6th Cir. 1981); *Gomez v. Wilson*, 477 F. 2d 411, 416; *cf.*, *Wilson v. Volkswagen of America, Inc.*, 561 F. 2d 494, 510, n.38 (4th Cir. 1977). Applying that rule, we have reviewed in this appeal the record in the other proceeding between the parties. It is obvious that Koons Ford cannot meet the "clean hands" requirement as a condition for objecting to the bargaining order in this case. It would be, therefore, a waste of judicial time to remand this cause to the Board to consider the "clean hands" issue.

Enforcement of the Board's bargaining order is accordingly ordered.

ENFORCEMENT ORDERED.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 3

Cases 5-CA-17683
5-CA-17917
5-CA-17933

KOONS FORD OF ANNAPOLIS, INC.

and

DISTRICT 65, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA

SETTLEMENT STIPULATION

Upon a charge filed by District 65, United Automobile, Aerospace and Agricultural Implement Workers of America, herein called the Union, on December 11, 1985, in Case 5-CA-17683, and served by certified mail on Koons Ford of Annapolis, Inc., herein called Respondent, on that same date, receipt of which is hereby acknowledged by Respondent; and upon a charge and first amended charged filed by the Union on January 21, 1986 and February 12, 1986, respectively, in Case 5-CA-17770, and served by certified mail on Respondent on January 22, 1986 and February 13, 1986, respectively, receipt of which is hereby acknowledged by Respondent, an Order Consolidating Cases, Amended Complaint, Consolidated Complaint and Notice of Hearing issued on March 28, 1986; and upon a charge and first amended charge filed

by the Union on March 17, 1986 and May 5, 1986, respectively, in Case 5-CA-17917, and served by certified mail on Respondent on March 18, 1986 and May 8, 1986, respectively, receipt of which is hereby acknowledged by Respondent; and upon a charge and first amended charge filed by the Union on March 21, 1986 and May 5, 1986, respectively, in Case 5-CA-17933, and served by certified mail on Respondent on March 24, 1986 and May 8, 1986, respectively, receipt of which is hereby acknowledged by Respondent, an Order Consolidating Cases, Amended Consolidated Complaint, Second Consolidated Complaint and Notice of Hearing issued on May 23, 1986; and upon a Order issued on March 2, 1987, by Administrative Law Judge Benjamin Schlesinger, severing the charge in Case 5-CA-17770 from the Order Consolidating Cases, Amended Consolidated Complaint, Second Consolidated Complaint and Notice of Hearing dated May 23, 1986, and granting leave to amend the complaint in Cases 5-CA-17933, 5-CA-17917 and 5-CA-17933, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the Regional Director of the Fifth Region of the Board, acting pursuant to Section 10(b) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et seq., herein called the Act, and Section 102.15 and 102.17 of the Board's Rules and Regulations, Series 8, as amended, issued an Amended Order Consolidating Cases, Amended Complaint, Third Consolidated Complaint and Notice of Hearing against Respondent on March 5, 1987, which was served by certified mail on Respondent on March 5, 1987, receipt of which is also hereby acknowledged by Respondent:

2. (a) At all times material herein, Respondent, a Maryland corporation with an office and place of business in Annapolis, Maryland herein called Respondent's facility, has been engaged in the retail sale and service of automobiles.

(b) During the preceding twelve months, a representative period, Respondent, in the course and conduct

of its business operations described above in paragraph 2(a), derived gross revenues in excess of $500,000.

(c) During the period of time described above in paragraph 2(b), Respondent, in the course and conduct of its business operations described above in paragraph 2(a), purchased and received at its facility goods and materials valued in excess of $5,000 directly from points outside the State of Maryland.

3. Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

4. The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

5. All parties hereto waive the filing of answers, hearing, administrative law judge's decision and the filing of exceptions and briefs and argument before the Board, the making and findings of fact and conclusions of law by the Board, and all further and other proceedings to which the parties may be entitled under the Act before the National Labor Relations Board, or the Board's Rules and Regulations, as well as withdrawing any answers previously filed herein.

6. This Stipulation, together with the charges and amended charges, the Administrative Law Judge's Order dated March 2, 1987, and the Amended Order Consolidating Cases, Amended Complaint, Third Consolidated Complaint and Notice of Hearing dated March 5, 1987, in Cases 5-CA-17683, 5-CA-17917 and 5-CA-17933 shall constitute the entire record herein.

7. Upon this Stipulation and record herein, as described above in paragraph 6 hereof, and without any further notice of proceedings herein, the Board may enter an order forthwith providing as follows:

(a) Respondent, its officers, representatives, agents, servants, employees, and all persons acting in concert or participation with it or them, including their successors and assigns, shall cease and desist from:

(1) promising employees raises and a pension plan if they abandon support for the Union as their collective-bargaining representative;

(2) soliciting employees to persuade other employees to abandon support for the Union as their collective-bargaining representative;

(3) informing employees that it would be futile to support the Union as their collective-bargaining representative;

(4) informing employees that Respondent would not bargain with the Union as their collective-bargaining representative;

(5) soliciting employees to decertify the Union as their collective-bargaining representative;

(6) offering to assist employees to decertify the Union as their collective-bargaining representative;

(7) threatening employees with discharge if they engage in protected concerted activities;

(8) threatening employees with discharge because of their activities in support of the Union by telling employees that Respondent wanted to get rid of all the troublemakers in the shop;

(9) discouraging membership in or activities on behalf of the Union, or any other labor organization, by discharging employees or by issuing letters of warning to employees or by otherwise discriminating against employees in any manner with respect to their hire or tenure of employment or any term or condition of employment;

(10) discharging employees or issuing letters of warning to employees or otherwise discriminating against employees in any manner with respect to their hire or tenure of employment or any term or condition of employment because they have filed charges or given testimony under the National Labor Relations Act;

(11) discharging employees or issuing letters of warning to employees because of their engaging in contacting the Maryland Occupational Safety and Health Administration regarding safety problems or participating in safety-related investigations and inspections or because of their engaging in concerted activity protected under Section 7 of the National Labor Relations Act;

(12) in any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed them by the National Labor Relations Act.

(b) Respondent, its officers, agents and successors and assigns shall take the following affirmative action to effectuate the policies of the National Labor Relations Act, as amended:

(1) We have offered Joseph Smith, Ricky Kubert, and Fred Pierson, full and immediate reinstatement to their former positions, which they have declined, without prejudice to their seniority or any other rights and privileges, and will make Smith, Kubert and Pierson whole, with interest, for any loss of earnings and other benefits suffered by reason of their discharges by payment to them of the amounts of money set forth opposite their respective names:

Joseph Smith—$3,000.00 backpay, plus interest

Ricky Kubert—$5,000.00 backpay, plus interest

Fred Pierson—$6,000.00 backpay, plus interest

(2) Expunge from our files any reference to the discharges of Joseph Smith, Ricky Kubert and Fred Pierson, and notify those employees in writing that this has been

done and that evidence of their discharges will not be used as a basis for future personnel action against them.

(3) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(4) Post immediately in conspicuous places at its Annapolis, Maryland facility, in places where notices to employees are customarily posted, copies of the notice attached as "Appendix A." Copies of the notices to be furnished by the Regional Director for Region 5, after being clearly signed by a representative of Respondent, shall be posted immediately upon receipt thereof and maintained for 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced or covered by other material.

(5) Notify the Regional Director for Region 5, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply therewith, and at the same time, submit to the Regional Director checks, payable to the above-named employees, in the amounts specified in paragraph 7(b)(1) above. For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized representatives, may obtain discovery from Respondent, its officers, agents, successors or assigns, or any other person having knowledge concerning any compliance matter, in the manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States Court of Appeals enforcing this Order and may be had upon any matter reasonably related to compliance with this Order, as enforced by the Court.

8. The United States Court of Appeals for any appropriate circuit may, upon application by the Board, enter its judgment enforcing the Order of the Board in the form set forth in paragraph 7 hereof. Respondent waives all defense to the entry of the judgment, including compliance with the Order of the Board, and its right to receive notice of the filing of an application for the entry of such judgment, provided that the judgment is in the words set forth in paragraph 7 hereof. However, Respondent shall be required to comply with the affirmative provisions of the Board's Order after entry of the judgment only to the extent that it has not already done so.

9. This Stipulation contains the entire agreement of the parties, there being no agreements of any kind, verbal or otherwise, which vary, alter or add to it. It is expressly understood that by entering this Stipulation, Respondent does not admit it violated the National Labor Relations Act, as amended.

10. This Stipulation, together with the other documents constituting the record as described in paragraph 6 hereof, shall be filed with the Board. The Stipulation is subject to the approval of the Board, and it shall be of no force and effect until the Board has granted such approval. Upon the Board's approval of the Stipulation, Respondent shall immediately comply with the provisions of the Order as set forth in paragraph 7 hereof.

KOONS FORD OF ANNAPOLIS, INC.

/s/ Robert E. Campbell
ROBERT E. CAMPBELL, Attorney
DONOVAN, LEISURE, NEWTON &
IRVINE
1850 K Street, N.W.
Washington, DC 20006

Date: March 18, 1987

APPROVAL BY THE GENERAL
COUNSEL RECOMMENDED:

/s/ Joseph J. Baniszewski,
JOSEPH J. BANISZEWSKI, Attorney
National Labor Relations Board
Region 5
Candler Building, 4th Floor
109 Market Place
Baltimore, Maryland 21202

Date: March 25, 1987

Approved:

/s/ Benjamin Schlesinger
BENJAMIN SCHLESINGER
Administrative Law Judge
National Labor Relations Board
Washington, DC 20570

Date: 8 April 1987

DISTRICT 65, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL
IMPLEMENT WORKERS OF
AMERICA

/s/ Ellen F. Moss
ELLEN F. MOSS, Attorney
13 Astor Place
New York, NY 10003

Date: 3/10/87

JDO-14-87

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

Cases 5-CA-17683
5-CA-17917
5-CA-17933

KOONS FORD OF ANNAPOLIS, INC.

and

DISTRICT 65, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA

RECOMMENDATION OF APPROVAL OF FORMAL SETTLEMENT

The parties having agreed to formally settle this unfair labor practice proceeding by making whole employees Joseph Smith, Ricky Kubert, and Fred Pierson for any loss of earnings and other benefits they suffered by reason of their discharges and agreeing to cease and desist from violating the National Labor Relations Act in all the respects alleged in the complaint herein,

I hereby recommend that the National Labor Relations Board approve the formal settlement herein,[1] signed by

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[1] I have corrected one inadvertent typographical error in paragraph 7(a)(11).

counsel of the General Counsel on 25 March 1987, Respondent on 18 March 1987, and the Charging Party on 10 March 1987. The settlement provides almost the complete relief to which the Charging Party would be entitled should a Decision and Order issue, will result in the accelerated restoration of harmony between Respondent and the Charging Party, and will conserve the resources of all parties and the Board in reviewing a transcript of in excess of 4100 pages and the preparation of briefs and decisions. I note that paragraph 7(a)(12) does not provide for the broad cease-and-desist order which would be warranted by the Board's earlier finding of violations committed by Respondent in 282 NLRB No. 88 (1986), but the Order therein contains a broad order (slip op., fn. 1), which should protect the interests of the Charging Party.

/s/ Benjamin Schlesinger
BENJAMIN SCHLESINGER
Administrative Law Judge

Dated: 8 April 1987

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 5-CA-17683
5-CA-17917
5-CA-17933

KOONS FORD OF ANNAPOLIS, INC.

and

DISTRICT 65, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA

Date of Mailing 8 April 1987

AFFIDAVIT OF SERVICE OF
RECOMMENDATION OF APPROVAL
OF FORMAL SETTLEMENT

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document*(s)* by post-paid certified mail upon the following persons, addressed to them at the following addresses:

Robert E. Campbell, Esq.
Donovan, Leisure, Newton & Irvine
1850 K Street, NW
Washington, DC 20006

Joseph J. Baniszewski, Esq.
National Labor Relations Board
Candler Building, 4th Floor
109 Market Place
Baltimore, Maryland 21202

Ellen F. Moss, Staff Counsel
District 65, UAW
13 Astor Place
New York City, New York 10003

Subscribed and sworn to before me this 8th day of April, 1987.

Designated Agent, AUGUSTUS C. SAUNDERS

NATIONAL LABOR RELATIONS BOARD

DS-1996
Annapolis, MD

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 5-CA-17683
5-CA-17917
5-CA-17933

KOONS FORD OF ANNAPOLIS, INC.

and

DISTRICT 65, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA

DECISION AND ORDER

Statement of the Cases

On 25 March 1987 Koons Ford of Annapolis, Inc., herein called Respondent; District 65, United Automobile, Aerospace and Agricultural Implement Workers of America, herein called the Union; and the General Counsel of the National Labor Relations Board entered into a Settlement Stipulation, approved by the Administrative Law Judge and subject to the Board's approval, providing for the entry of a consent order by the Board and a consent judgment by any appropriate United States Court of Appeals. The parties waived all further and other procedure before the Board to which they may be entitled under the National Labor Relations Act, as

amended, and the Board's Rules and Regulations, and Respondent waived its right to contest the entry of a consent judgment or to receive further notice of the application therefor.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Settlement Stipulation is approved and made a part of the record, and the proceeding is transferred to and continued before the Board in Washington, D.C., for the entry of a Decision and Order pursuant to the provisions of the Settlement Stipulation.

Upon the basis of the Settlement Stipulation and the entire record, the Board makes the following:

Findings of Fact

1. The Respondent's business

During the preceding 12 months, a representative period, Respondent, in the course and conduct of its business operations described above, derived gross revenues in excess of $500,000.

During the period of time described above, Respondent, in the course and conduct of its business operations described above, purchased and received at its facility goods and materials valued in excess of $5,000 directly from points outside the State of Maryland.

The Respondent admits, and we find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The labor organization involved

District 65, United Automobile, Aerospace and Agricultural Implement Workers of America is a labor organization within the meaning of Section 2(5) of the Act.

ORDER

Upon the basis of the above findings of fact, the Settlement Stipulation, and the entire record and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board orders that:

The Respondent, Koons Ford of Annapolis, Inc., its officers, representatives, agents, servants, employees, and all person acting in concert or participation with it or them, including their successors and assigns, shall:

1. Cease and desist from:

(a) promising employees raises and a pension plan if they abandon support for the Union as their collective-bargaining representative;

(b) soliciting employees to persuade other employees to abandon support for the Union as their collective-bargaining representative;

(c) informing employees that it would be futile to support the Union as their collective-bargaining representative;

(d) informing employees that Respondent would not bargain with the Union as their collective-bargaining representative;

(e) soliciting employees to decertify the Union as their collective-bargaining representative;

(f) offering to assist employees to decertify the Union as their collective-bargaining representative;

(g) threatening employees with discharge if they engage in protected concerted activities;

(h) threatening employees with discharge because of their activities in support of the Union by telling employees that Respondent wanted to get rid of all the troublemakers in the shop;

(i) discouraging membership in or activities on behalf of the Union, or any other labor organization, by discharging employees or by issuing letters of warning to employees or by otherwise discriminating against employees in any manner with respect to their hire or tenure of employment or any term or condition of employment;

(j) discharging employees or issuing letters of warning to employees or otherwise discriminating against employees in any manner with respect to their hire or tenure of employment or any term or condition of employment because they have filed charges or given testimony under the National Labor Relations Act;

(k) discharging employees or issuing letters of warning to employees because of their engaging in contacting the Maryland Occupational Safety and Health Administration regarding safety problems or participating in safety-related investigations and inspections or because of their engaging in concerted activity protected under Section 7 of the National Labor Relations Act;

(l) in any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed them by the National Labor Relations Act.

2. Take the following affirmative action which the National Labor Relations Board finds will effectuate the policies of the National Labor Relations Act, as amended:

(a) We have offered Joseph Smith, Ricky Kubert, and Fred Pierson, full and immediate reinstatement to their former positions, which they have declined, without prejudice to their seniority or any other rights and privileges, and will make Smith, Kubert and Pierson whole, with interest, for any loss of earnings and other benefits suffered by reason of their discharges by payment to them of the amounts of money set forth opposite their respective names:

Joseph Smith—$3,000.00 backpay, plus interest
Ricky Kubert—$5,000.00 backpay, plus interest
Fred Pierson—$6,000.00 backpay, plus interest

(b) Expunge from our files any reference to the discharges of Joseph Smith, Ricky Kubert and Fred Pierson, and notify those employees in writing that this has been done and that evidence of their discharges will not be used as a basis for future personnel action against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment record, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post immediately in conspicuous places at its Annapolis, Maryland facility, in places where notices to employees are customarily posted, copies of the attached Notice to Employees. Copies of the Notices to be furnished by the Regional Director for Region 5, after being clearly signed by a representative of Respondent, shall be posted immediately upon receipt thereof and maintained for 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 5, in writing within 10 days from the date of this Order, what steps Respondent has taken to comply herewith, and at the same time, submit to the Regional Director checks, payable to the above-named employees, in the amounts specified above. For the purpose of determining or securing compliance with the Order, the Board, or any of its duly authorized representatives, may obtain discovery from Respondent, its officers, agents, successors or assigns, or any other person having knowledge concerning

any compliance matter, in the manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States Court of Appeals enforcing this Order and may be had upon any matter reasonably related to compliance with this Order, as enforced by the Court.

Dated, Washington, D.C., 28 May 1987

DONALD L. DOTSON, Chairman

WILFORD W. JOHANSEN, Member

MARY MILLER CRACRAFT, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

DS-1995

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT promise employees raises and a pension plan if they abandon support for District 65, UAW, as their collective-bargaining representative.

WE WILL NOT solicit employees to persuade other employees to abandon support for District 65, UAW, as their collective-bargaining representative.

WE WILL NOT inform employees that it would be futile to support District 65, UAW, as their collective-bargaining representative.

WE WILL NOT inform employees that we will not bargain with District 65, UAW, as their collective-bargaining representative.

WE WILL NOT solicit employees to decertify District 65, UAW, as their collective-bargaining representative.

WE WILL NOT offer to assist employees to decertify District 65, UAW, as their collective-bargaining representative.

WE WILL NOT threaten employees with discharge if they engage in protected concerted activities.

WE WILL NOT threaten employees with discharge because of their activities in support of District 65, UAW, by telling employees that we want to get rid of all the troublemakers in our shop.

WE WILL NOT discourage membership in our activities on behalf of District 65, UAW, or any other labor organization, by discharging employees or by issuing letters of warning to employees or otherwise discriminating

against employees in any manner with respect to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT discharge employees or issue letters of warning to employees or otherwise discriminate against employees in any manner with respect to their hire or tenure of employment or any term or condition of employment because they file charges or give testimony under the National Labor Relations Act.

WE WILL NOT discharge employees or issue letters of warning to employees because of their engaging in contacting the Maryland Occupational Safety and Health Administration regarding safety problems or participating in safety-related inspections and investigations or because of their engaging in concerted activity protected under Section 7 of the National Labor Relations Act.

WE HAVE offered Joseph Smith, Ricky Kubert, and Fred Pierson, full and immediate reinstatement to their former positions, which they have declined, without prejudice to their seniority or any other rights and privileges, and WE WILL make Joseph Smith, Ricky Kubert and Fred Pierson whole, with interest, for any loss of earnings or other benefits suffered by reason of their discharges.

WE WILL expunge from our files any reference to the discharges of Joseph Smith, Ricky Kubert and Fred Pierson, and WE WILL notify them, in writing, that this has been done, and that evidence of their discharges will not be used as a basis for future personnel action against them.

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce our employees in the exercise of rights guaranteed in the National Labor Relations Act Section 7 of the National Labor Relations Act guarantees our employees these rights:

To organize

To form, join or assist any union

To bargain collectively through representatives of their own choosing

To act together for mutual aid or protection

Our employees are free to become members of or to engage in activities on behalf of District 65, United Automobile, Aerospace and Agricultural Implement Workers of America, or any other labor union.

KOONS FORD OF ANNAPOLIS, INC.
(Employer)

Date _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Candler Building—4th Floor, 109 Market Place, Baltimore, MD 21202. Telephone 301-962-2772.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-3837

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

KOONS FORD OF ANNAPOLIS, INC.,
Respondent.

[Filed Aug. 6, 1987]

JUDGMENT

Before:

THIS CAUSE was submitted upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent, Koons Ford of Annapolis, Inc., its officers, representatives, agents, servants, employees, and all persons acting in concert or participation with it or them, including their successors and assigns, on 28 May 1987, in a proceeding before the said Board numbered 5-CA-17683, 5-CA-17917 and 5-CA-17933; upon the transcript of the record in said proceeding, certified and filed in this Court enforcing the order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Fourth Circuit that the said order of the National Labor Relations Board be, and the same is hereby enforced; and that Respondent, Koons Ford of Annapolis, Inc., its

officers, representatives, agents, servants, employees, and all person acting in concert or participation with it or them, including their successors and assigns, abide by and perform the directions of the Board in said order contained.

Mandate shall issue forthwith.

/s/ Harrison L. Winter
Chief Judge, Fourth Circuit

/s/ H. Emory Widener, Jr.
United States Circuit Judge

/s/ Donald Russell
United States Circuit Judge

282 NLRB No. 88

DBS

D—4192
Annapolis, MD

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 5—CA—15050
5—RC—11899

KOONS FORD OF ANNAPOLIS, INC.

and

DISTRICT 65, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA

DECISION AND ORDER

On 30 May 1984 Administrative Law Judge Marvin Roth issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief. Additionally, the Respondent filed three motions to reopen the record and the General Counsel filed a brief in opposition to the Respondent's first motion to reopen the record.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to

affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.

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[1] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by interrogating employees concerning their union sympathies, we do not rely on his citation to *Vincent et Vincent of Allentown Mall*, 259 NLRB 1025 (1982), insofar as that case applies a per se rule regarding interrogation violations. See *Rossmore House*, 269 NLRB 1176 (1984).

The judge recommended that the Board issue a narrow cease-and-desist order requiring the Respondent to cease and desist from violating the Act "in any like or related manner." We find the Respondent's conduct in this case egregious enough to warrant the issuance of a broad cease-and-desist order. Accordingly, we shall substitute the broad injunctive language, requiring the Respondent to cease and desist from violating the Act "in any other manner," for the provision recommended by the judge. See *Hickmott Foods*, 242 NLRB 1357 (1979).

[2] The Respondent excepts to the judge's finding that it violated Sec. 8(a)(3) and (1) of the Act by granting unlawful wage increases, basing its exception, in part, on certain factual errors made by the judge. We have reviewed the decision in light of the record evidence and the Respondent's contentions and make the following factual corrections.

The judge found that the Respondent's new car make-ready manager, Irv Sherbert, held a meeting with employees under his supervision and thereafter recommended raises to General Manager Hendrick on 4 January 1983. However, Sherbert met with these employees and made his recommendations to Hendrick in mid-December 1982. In addition, the judge stated that when Parts Department Manager Richard Gavin recommended raises in January 1983 for three of his employees, their names were added to a list which Hendrick had already prepared containing the names of three other employees also under the supervision of Gavin—employees Conway, Mitchell, and James Sherbert. Employees Conway, Mitchell, and Sherbert, however, were parts department employees

1. The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by granting the "technician of the year" award to its mechanics in order to discourage employee support for the Union. We disagree. As noted by the judge, the complaint does not contain any allegations with respect to this conduct. At the hearing, the Respondent raised the "technician of the year" award by way of defense to other allegations of unlawful conduct found in the complaint. Counsel for the General Counsel stated that he was not previously aware of such an award, but at no time did he take a position with respect to the award, nor attempt to amend the complaint to allege the "technician of the year" award as a violation. Since the complaint contains no allegation that this conduct was unlawful, and the General Counsel did not seek to amend the complaint after he learned of the award, nor urge its illegality, we find that the matter was not fully litigated as a violation of the Act. Accordingly, we do not adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by granting the award.

2. The judge found that the Respondent's general manager, Ronald Hendrick, violated Section 8(a)(1) of

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in the Porsche-Audi Division, which was not under Gavin's supervision. In correcting these errors, we find that the remaining evidence as set forth by the judge fully supports his finding that the Respondent granted unlawful wage increases. In so finding, we agree with the judge's conclusion that the unlawful wage increases. In so finding, we agree with the judge's conclusion that the unlawful wage increases were violative of Sec. 8(a)(1).

Further, we do not rely on any adverse inference the judge may have drawn from employee Archie Brown's testimony that he was never evaluated pursuant to the Respondent's alleged semiannual review policy. Brown was a body shop employee who was not subject to the semiannual review policy described by the Respondent.

Member Babson additionally notes that the unlawful wage increases constitute independent violations of Sec. 8(a)(1) of the Act under *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

the Act by threatening certain employees that "if the Union got in he would not be able to talk directly to the employees as he had been doing but would have to go to the Union." The Board has recently held in *Tri-Cast, Inc.*, 274 NLRB 377 (1985), that a statement concerning loss of access to management in the event of unionization does not constitute a threat but "simply explicates one of the changes which occur between employers and employees when a statutory representative is selected."[3] Accordingly, we find Hendrick's statement did not constitute unlawful conduct. Therefore, we dismiss this allegation of the complaint.

3. In his recommended Order, the judge provided, inter alia, that the election be set aside, that a cease-and-desist order be issued, and that the Respondent recognize and, on request, bargain collectively with the Union as the exclusive bargaining representative of the employees in the unit found appropriate. We agree.[4]

In ascertaining whether a bargaining order is warranted to remedy the Respondent's misconduct we apply the test set out in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In *Gissel*, the Court delineated two types of situations where bargaining orders are appropriate: (1) "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices; and (2) "less extraordinary" cases marked by "less pervasive" practices.[5] Thus, the Court placed its approval on the Board's use of a bargaining order in "less extraordinary" cases where the employer's unlawful conduct has a "tendency to undermine [the union's] majority strength and

[3] Ibid.

[4] In agreeing with the judge that the election should be set aside, Chairman Dotson finds it unnecessary to rely on his citation to *Enola Super Thrift*, 233 NLRB 409 (1977), and *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962), and any language found therein.

[5] *Gissel*, supra at 613-614.

impede the election processes."[6] The Court indicated that when the unfair labor practices are less flagrant and the union at one time had a majority support among the unit employees the Board may consider

> the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.[7]

In considering the Respondent's conduct in this case the judge intimated, without explicitly stating, that the unfair labor practices the Respondent committed fall into the second category rather than the first category.[8] We find it unnecessary to resolve whether the conduct is Category I or Category II since we find that the Respondent's conduct falls into at least the second category and therefore a bargaining order is warranted in any event.

The judge noted there were approximately 26 instances from mid-November 1982 until the 12 January 1983 election in which four of the Respondent's officials, including President John Koons Jr., either threatened em-

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[6] Id. at 614.

[7] Id. at 614-615.

[8] The judge stated that the case would have plainly constituted a "Category I" case had John Koons not backed away from a prior threat to close the plant. In issuing the bargaining order, he found that the Respondent "has engaged in a pattern of unremedied unfair labor practices which effectively destroyed the conditions for a free and fair election [and] that those conditions probably cannot and will not be restored at any time in the forseeable future."

ployees with plant closure, discharge, and layoff, more onerous working conditions and stricter work rules leading to the discharge of employees, and loss of privileges and benefits; interrogated employees concerning their union sympathies and the organization campaign; or unlawfully solicited employees to campaign against the Union.

The most serious of the threats were those of plant closure, discharge, and layoff made by John Koons Jr., Service Manager Tomarchio, and Sherbert. In early December during the height of the union organizational campaign, Koons, while interrogating employee Pierson about the Union, told him that "he didn't need the dealership and he would close it down and turn it into an apartment building or an office building." Later that month, at the annual Christmas party, a heated argument ensued between Hendrick and employee Kubert. John Koons intervened and with several employees present stated that "he did not need Koons Ford of Annapolis, that he had a place in Florida and could close the doors and move to Florida and that life would go on without Koons Ford." In response to Kubert's statement that he would not put his job on the line if he did not feel strongly about the Union, Koons replied, "You already have."

Tomarchio engaged in similar threats while informing employee Jones that if the Union came in they would lose the benefits of working on cars on their own outside the dealership. Tomarchio told him he would be fired if he attempted to circumvent that regulation. He reiterated the threats Koons made at the Christmas party by telling Jones that Koons did not need the Annapolis dealership and could close its doors and lock employees out. Additionally, Tomarchio told employees Kubert and West that with the stricter regulations that would be established once the Union came in, employees could be fired

or fined for coming in late, making unsatisfactory car repairs, or asking for more time to complete a job.

Finally, Sherbert also engaged in discharge threats.[9] While meeting with some of his department employees after work, Sherbert threatened on two occasions the two least senior employees in his department that if the Union came in they would be laid off. He also threatened employees Howes and Buckalew with discharge, stating that employees who did "anything wrong," who "goofed," or were "late even once" would be fired.

Other threats of reprisal were also made. For example, General Manager Hendrick threatened that if the Union came in the employees would lose such privileges as "hobby night" (where employees used the facility to work on their own cars free of charge), discounts on parts, loans, the annual Christmas party, and leaving work early, all of which benefits were considered important "perks" by the employees. These threats were directed at individual employees as well as at groups of employees at regularly scheduled service department meetings. Tomarchio also issued threats of this nature to individual employees throughout November and December 1982 as did Sherbert at his regular gathering of department employees each night after work.

In addition to threatening the employees, interrogating them, and soliciting some of them to campaign against the Union, the Respondent unlawfully granted wage increases and redressed employee grievances. Thus, on 6 January 1983 the Respondent, to discourage support for the Union, gave pay increases averaging between 25 and 60 cents per hour to 15 used car, parts, and make-

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[9] The judge specifically noted that although Manager Sherbert was a low-level supervisor, he was "looked upon as something of a father figure by the young unskilled employees" and "[t]herefore he was in a position to exert strong influence on these employees." We draw no conclusions from how Sherbert was subjectively perceived by his department employees and disregard the judge's remark in this regard.

ready department employees.[10] For the same reason, and on the same day, nine body shop employees had their compensation formula changed in response to their expressed complaints, a change which also resulted in an increase in wages for them. Accordingly, the judge found that the Respondent violated the Act by both redressing employees' grievances and by granting an unlawful wage increase.[11]

In determining whether a bargaining order is appropriate, in addition to examining the severity of the violations committed, the Board also examines the present effects of the coercive unfair labor practices which would prevent the holding of a fair election.[12]

It is highly significant that many of the violations present here were of an extremely serious nature. Both the courts and the Board have long recognized that threats of job loss (i.e., plant closure, discharge, and layoff) because of union activity are among the most fla-

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[10] The judge, after analyzing the increases granted to the 15 employees, inadvertently concluded that 16 employees received increases.

[11] We agree with the judge that the change in the body shop employees' compensation formula constituted an unlawful redress of grievances with or without the increase in their wages.

[12] *Quality Aluminum Products*, 278 NLRB No. 49, slip op. at 5 (Jan. 31, 1986). See *NLRB v. Davis*, 642 F.2d 350, 354 (9th Cir. 1981), where the court stated that *Gissel* instructed the Board to consider the extensiveness of the unfair labor practices, their past effect on election conditions, the likelihood of their recurrence, and the probability that a fair election can be held. See also *NLRB v. Appletree Chevrolet*, 608 F.2d 988, 997 (4th Cir. 1979), where the court stated that since an election is the preferred method for determining a bargaining agent, to justify the issuance of a bargaining order the Board must "go beyond a finding of such unfair labor practices and . . . make 'a detailed analysis assessing the possibility of holding a fair election in terms of any continuing effect of misconduct, and the potential effectiveness of ordinary remedies.' "

grant interference with Section 7 rights and are more likely to destroy election conditions for a lengthier period of time than other unfair labor practices.[13] Indeed, the natural and likely result of the threats found here was to reinforce the employees' fear that they would lose employment if they persisted in their union activity. This fear was exacerbated by the fact that these violations were committed by Koons, the Respondent's top official, and two department managers of the unit employees. The positions these persons held clearly served to strengthen and amplify in the minds of the employees the seriousness of the threats conveyed.[14]

The Respondent's carefully calculated and timed wage increase for 15 make-ready, parts, and used car department employees on 6 January 1983 was an equally serious violation. The same can be said of the 6 January 1983 wage increase to the nine body shop employees resulting from the concomitant redress of their grievances to change the compensation formula. The body shop employees' compensation change was enacted after the Respondent offered employees a choice between the existing formula, over which the employees had constantly expressed their displeasure, and the old formula, which the employees manifestly preferred. This was clearly a "deliberately embarked upon . . . course of action designed to convince the employees that their demands [would] be met through direct dealing with Respondent and that union representation could in no way be advantageous to them. Obviously such conduct must, of necessity, have a strong coercive effect on the employees' freedom of choice, serving as it does to eliminate, by unlawful means and

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[13] See, e.g., *Gissel*, supra at 611 fn. 31; *Piggly Wiggly v. NLRB*, 705 F.2d 1537, 1542 (11th Cir. 1983); *Thriftway Supermarket*, 276 NLRB No. 164 (Oct. 16, 1985).

[14] See *Kona 60 Minute Photo*, 277 NLRB No. 92 (Nov. 26, 1985); *Ohio New & Rebuilt Parts*, 267 NLRB 420 (1983).

tactics, the very reason for a union's existence." [15] Wage increases in particular have a potential long-lasting effect, since the Board's traditional remedies do not require the Respondent to withdraw the benefits from the employees.[16]

Finally, the numerous and extensive threats of loss of benefits and more onerous work conditions, repeatedly and persistently engaged in by the Respondent's officials, suggest a careful orchestration and general campaign to destroy employee support for the Union.

The success of the Respondent's unlawful campaign is illustrated by the clear dissipation of union support during the period of the Respondent's most egregious violations. By 16 December the Union had obtained at least 38 valid authorization cards out of a total of 66 unit employees.[17] Less than 1 month later, the Union received

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[15] *Teledyne Dental Products Corp.*, 210 NLRB 435 (1974).

[16] *Red Barn System*, 224 NLRB 1586 (1976), enfd. 574 F.2d 315 (6th Cir. 1976).

[17] The Respondent excepts to the judge's findings that 11 particular authorization cards are valid. Mechanics with helpers were involved in the signing or solicitation of nine of those cards, and the Respondent contends that those mechanics are supervisors under the Act. Of those nine cards, the card of employee McMullen is also alleged by the Respondent to be invalid under *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 277 (1973). The remaining 2 cards of the 11 that the Respondent challenges as invalid are those of Lawrence and Epling. The General Counsel excepts to the judge's finding as invalid one card signed by employee Snodgrass. Based on his findings, the judge concluded the Union demonstrated majority support as of 24 November 1982 (32 out of 62 unit employees) and 16 December 1982 (40 out of 66 unit employees).

We adopt the judge's finding that the mechanics with helpers were not supervisors under the Act. See *Soil Engineering Co.*, 269 NLRB 55 (1984). Having made this determination, it is clear that by at least 16 December 1982 a majority of the employees had designated the Union as their representative. Accordingly, we find it unneces-

only 27 votes in the election. It was within this 3- to 4-week period that John Koons Jr. and other officials of the Respondent made threats of plant closure and job loss and within 1 week of the election granted wage increases and redressed employee grievances. The Respondent's officials also throughout this period repeatedly hammered home the theme that unionization would result in loss of benefits and more onerous working conditions for employees.

We find that the inhibitive effects of these unfair labor practices are likely to persist despite a substantial level of turnover and concomitant passage of time.[18] We note the judge's finding that a substantial portion of the turnover occurred among the Respondent's younger less skilled employees, while many of the older more skilled employees, who were the direct targets of many of the threats, are still employed. Even assuming the accuracy of the facts as set forth in the Respondent's 1 October 1986 motion to reopen the record, the 21 remaining unit employees include: 3 of the 13 mechanics whose depart-

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sary to pass upon the validity of the cards signed by employees Lawrence, McMullen, Snodgrass, and Epling.

Chairman Dotson, who dissented in *Soil Engineering Co.* on the basis that the employees with helpers clearly had the independent authority to discharge a helper, would agree with the judge's finding that here the mechanics with helpers exhibited no such authority. Accordingly, he also adopts the judge's finding that the mechanics with helpers were not supervisors under the Act.

[18] The Respondent filed three motions to reopen the record to present supplemental evidence indicating the change in ownership from John Koons Jr. to Joseph Koons on 1 July 1984 as well as evidence of employee and management turnover subsequent to the hearing. In its latest motion, the Respondent presented evidence that as of 1 October 1986, only 21 of the original 66 unit employees remained and the proposed unit has expanded to 92 employees. We deny the motions to reopen on the basis that, as shown above, the evidence sought to be adduced would not require a different result. See Sec. 102.48(d)(1) of the Board's Rules and Regulations.

ment members were subject to the threats of plant closure and discharge; 4 of the 9 body shop employees whose compensation was changed resulting in an unlawful wage increase and redress of grievances; and 7 of the 15 parts, make-ready, and used car department employees who received wage increases the week of the election. In light of the extensive and repetitive nature of the violations, in particular the threats engaged in at general department meetings, we do not assume that other employees were unaffected. The continued presence of these employees creates a potential that the inhibitive effect of the unfair labor practices remain, preventing the possibility of a fair election.[19]

Substantially parallel circumstances were present in *NLRB v. Air Products & Chemicals*, 717 F.2d 141 (4th Cir. 1983), in which the Fourth Circuit enforced a bargaining order issued by the Board.[20] There, the employer engaged in similar unlawful activity, namely, threats to force a strike by not agreeing to union demands, of loss of benefits, and of the futility of selecting the union, as well as solicitation of employees to dissuade other employees from supporting the union. Additionally, three separate employer officials threatened employees with plant closure and there was one threat of discharge. As in the instant case, there were no 8(a)(3) unlawful discharges.[21] In issuing the bargaining order the Fourth Circuit relied on other factors specified by the Board that are also present in this case, namely, the substantial percentage of employees affected, the serious nature of the threats, the extended period over which the violations occurred, and the large number of managers guilty

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[19] See *Quality Aluminum*, supra.

[20] 263 NLRB 341 (1982).

[21] We note the facts here are even stronger for issuing a bargaining order in that, unlike *NLRB v. Air Products*, there was also an unlawful grant of benefits.

of violations. Id. at 147. The court concluded that these factors "clearly satisfie[d] the specificity requirement" the Board must meet to justify the issuance of a *Gissel* bargaining order. Id. at 146.

We believe that, under the circumstances of the instant case, simply requiring the Respondent to refrain from unlawful conduct will not eradicate the lingering effects of the hallmark violations, and will not deter their recurrence. We further conclude that the employees' representation desires, once expressed through authorization cards would, on balance, be better protected by our issuance of a bargaining order than by traditional remedies.

Accordingly, we adopt the judge's recommendation that the Respondent be required to bargain with the Union as the duly designated representative of a majority of its employees in the unit found appropriate for purposes of collective bargaining, effective 16 December 1982, the date by which the Union acquired authorization cards from a majority of employees in the unit after the Respondent had commenced its unlawful course of conduct.[22]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Koons Ford of Annapolis, Inc., Annapolis, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Threatening its employees with plant closure, loss of jobs, job security, or opportunity for advancement,

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[22] See fn. 17 supra. We need not decide whether the Union had a majority at an earlier date since all of the Respondent's unfair labor practices committed prior to 16 December 1982 are otherwise specifically remedied.

loss of privileges or benefits of employment, more onerous working conditions, futile contract negotiations, or other reprisals if they desiginate, select, or support District 65, United Automobile, Aerospace and Agricultural Implement Workers of America or any other labor organization as their bargaining representative."

2. Substitute the following for paragraph 1(g).

"(g) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

3. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the election in Case 5—RC—11899 is set aside and that the petition is dismissed.

Dated, Washington, D.C. 24 December 1986

DONALD L. DOTSON, Chairman

MARSHALL B. BABSON, Member

JAMES M. STEPHENS, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten you with plant closure, loss of jobs, job security, or opportunity for advancement, loss of privileges or benefits of employment, more onerous working conditions, futile contract negotiations, or other reprisals of you designate, select, or support District 65, United Automobile, Aerospace and Agricultural Implement Workers of America or any other labor organization as your bargaining representative.

WE WILL NOT coercively question you about your union attitude or activities or those of your fellow employees.

WE WILL NOT solicit you to engage in antiunion activity.

WE WILL NOT grant wage increases or other improvements in terms and conditions of employment, or remedy grievances, in order to discourage support for District 65; provided, however, that nothing herein requires us to vary or abandon any economic benefit or any term or condition or employment which we have heretofore established.

WE WILL NOT refuse to recognize or bargain collectively with District 65 as the exclusive bargaining representative of our employees in the following appropriate unit:

All full time and regular part time Service Department employees, including mechanics, body and paint shop workers, parts department employees, drivers, helpers, make ready employees, porters, dispatchers, and janitors employer at our Annapolis, Maryland, facility, but excluding sales persons, office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally change wages or other terms or conditions of employment without prior notice to District 65 or without affording District 65 an opportunity to negotiate and bargain concerning such matters.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain collectively in good faith with District 65 as the exclusive bargaining representative of our employees in the unit described above, and embody in a signed agreement any understanding reached.

–KOONS FORD OF ANNAPOLIS, INC.
(Employer)

Dated ———— By ————————————
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Candler Building, Fourth Floor, 109 Market Place, Baltimore, Maryland 21202, Telephone 301-962-2772.

JD-222-84
Annapolis, MD

UNITED STATES OF AMERICA BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Cases 5-CA-15050
5-RC-11899

KOONS FORD OF ANNAPOLIS, INC.,
Respondent-Employer

and

DISTRICT 65, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA,
Charging Party-Petitioner

Joseph J. Baniszewski, Esq., and *Edward Noonan, Esq.*, of Baltimore, MD, for the General Counsel.

Mr. Larry Steele, of Martinsburg, W. VA, for the Charging Party-Petitioner.

Robert Campbell, Esq., Albert Ledgard, Esq., and *Susan S. Grover, Esq.*, of Washington, D. C., for the Respondent-Employer.

DECISION

Statement of the Case

MARVIN ROTH, Administrative Law Judge: These consolidated cases were heard at Baltimore, Maryland, on June 6 through 9 and 20 through 24 and on October 17 and 18, 1983. The charge was filed by District 65, United Automobile, Aerospace and Agricultural Implement Workers of America (herein the "Union") on January 17, 1983.[1] The complaint, which issued on March 14 and was amended at the hearing, alleges that Koons Ford of Annapolis, Inc. (herein "Respondent" or the "Company"), violated Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended. The Company's answer denies the commission of the alleged unfair labor practices.

Pursuant to a Stipulation for Certification upon Consent Election approved by the Regional Director on December 16, an election was conducted on January 12, among the employees in the following appropirate unit:

> All full time and regular part time Service Department employees, including mechanics, body and paint shop workers, parts department employees, drivers, helpers, make ready employees, porters, dispatchers and janitors employed at [the Company's] Annapolis, Maryland, facility but excluding sales persons, office clerical employees, guards and supervisors as defined in the Act.

The tally of ballots showed that of approximately 66 eligible voters, 27 voted for the Union and 39 voted against the Union. There were no challenged ballots. The Union filed timely objections to the conduct of the election, numbered 1 through 15, but subsequently with-

[1] All dates herein are for the period from July 1, 1982 through June 30, 1983 unless otherwise indicated.

drew objections Nos. 5, 7, 8 and 14. On March 25 the Regional Director issued his Report on Objections, finding that the objections covered the same subject matter as the unfair labor practice complaint. The Regional Director ordered that the unfair labor practice and the representation cases be consolidated for the purpose of hearing, ruling and decision by an Administrative Law Judge, and that thereafter, the representation case be transferred to and continued before the Board.

All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally and to file briefs. Upon the entire record in this case,[2] and from my observation of the demeanor of the witnesses, and having considered the briefs submitted by General Counsel and the Company, I make the following:

Finding of Fact

I. The Business of Respondent

The Company, a Maryland corporation with an office and place of business in Annapolis, Maryland, is engaged in the retail sale and service of automobiles. In the operation of its business, the Company annually derives gross revenues in excess of $500,000, and annually purchases goods and materials valued in excess of $5,000 directly from points outside of Maryalnd. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

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[2] The official transcript of proceedings is hereby corrected in accordance with my order to show cause dated March 15, 1984.

III. The Issues

The principal issues in these cases are:

1. Whether the Company engaged in interrogation, threats of plant closure, discharge, layoff, loss of job security and opportunity for promotion, deprivation of benefits and privileges, more onerous working conditions, futility of selecting the Union as bargaining representative and other reprisals, solicitation of employees to inform management about union activities and to talk against the Union to other employees, all in order to discourage support for the Union, and thereby violated Section 8(a)(1) of the Act.

2. Whether the Company granted pay increases, bonuses and other changes in employee compensation in order to discourage employee support for the Union, and thereby violated Section 8(a)(1) and (3) of the Act.

3. Whether the election of January 12 should be set aside.

4. Whether by the above alleged unfair labor practices the Company precluded the holding of a fair election, and therefore violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as representative of the employees in the appropriate unit and unilaterally changing terms and conditions of employment. Subsidiary to this issue are the questions of whether an uncoerced majority of the Company's unit employees designated the Union as their bargaining representative, and whether mechanics with helpers are supervisors within the meaning of the Act, as alleged by the Company. (The status of these mechanics is also subsidiary to alleged violations of Section 8(a)(1) involving those individuals.)

IV. Background and Preliminary Issue: The Company's Operations at Annapolis, and the Status of Mechanics with Helpers

In order to place at least some of the present allegations in proper perspective, it is necessary to consider the history and organizational structure of the Company's operations. The Company is one of four automobile dealerships which are owned and actively controlled by John W. Koons, Jr. The other three, all in Northern Virginia, are JKJ Chevrolet, Koons Chrysler-Plymouth, and JKJ Chrysler-Plymouth. Koons also has a dealership in Florida, but he is not actively involved in its day-to-day operations. Koons is president of each of the dealerships. Since June, 1981, Ronald Hendrick has served as the Company's general manager in charge of the Annapolis dealership. Ned Tomarchio became service department manager in late March, 1982, succeeding Bob Rose. Tomarchio abruptly terminated his employment with the Company on December 20, 1982 under circumstances which will be discussed. James Collins, who previously served as a dispatcher and assistant to Tomarchio, became acting service manager and subsequently (in late January) was designated as service manager. However in April Collins was replaced in that capacity by Dave Sparrow. Collins remained in a subordinate capacity to Sparrow as administrative service manager. The service department, which is the most important department insofar as the present case is concerned, includes line mechanics (also known as technicians), service writers, the dispatcher, porters and mechanics' helpers. The body shop manager also reports to the service manager. At all times material, Betty Dorr was body shop manager. In December, 1982 the department had six body, or metal employees and three painters. Linwood Hall was body shop foreman (subordinate to Dorr) until some time in December. In early January, body employee Thalsberg

("Crip") Brown was promoted to foreman.[3] The sales department, headed by John Taber, includes new and used car sales and the finance office. In December and January, Mario Debini was in charge of new car sales. Irv Sherbert, who is and was at all times material, new car make-ready manager, normally reported to Debini, except that on technical matters he would report to the service manager. Make-ready included one mechanic and above five employees whose principal job was to clean, undercoat and otherwise prepare new cars for delivery and to do general maintenance work on the premises. Edward Christmas was used car manager. In December and January the used car department included 3 mechanics and one make-ready employee, in addition to non-unit salesmen. The finance office, headed by comptroller Bob Schmick, included about 6 clerical employees. The parts department, headed by Richard Garvin, included counter (sales) employees, clerks and drivers. There is also a general office. The Company also has a Porsche-Audi dealership, headed by Hendrick, parallel to but smaller than the Ford dealership, with its own sales, parts and service departments. (The unit includes both the Ford and Porsche-Audi dealerships).

In December and January, there were approximately 13 line mechanics in the Ford service department and 3 in the Porsche-Audi service department. The line mechanics, who are skilled workers, were normally paid on a flat rate hour basis. The mechanics were paid on hourly rate of up to $12.25 per hour, depending on their qualifications, i.e. number of certifications in specialized areas. However they were not paid by the clock. Rather their

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[3] Brown testified that he was promoted as of January 1. General Manager Hendrick testified that he promoted Brown 1 or 2 days after he delivered a speech to the service department employees. However the Company's records indicate that Brown was promoted to "body shop estimator" on January 5, the day Hendrick delivered the speech. I find that Brown was promoted prior to the speech.

pay depended on the time allowed for each job by the Chilton Manual, or the Ford Manual for warranty work. Thus a proficient mechanic could "beat the system," and thereby enhance his earnings, by regularly performing satisfactory work in less than the manual time (flat rate). Some mechanics found that they could also enhance their earning capacity by having a helper, i.e., an unskilled individual who was in the process of learning automotive mechanical work. Two mechanics (James Felesky and John Leary) each had one helper (Pat Evans and Daniel Pearsall, respectively). Mechanic Karl Jones had two helpers (Ed Buckalew and John Howes). Use of a helper was initiated at the request or direction of the general manager or the service manager. The evidence fails to indicate that any mechanic sought to obtain a helper. (When service manager Tomarchio told Jones that he should take a second helper, Jones suggested Howes, then a porter, because helper Buckalew had recommended him. However Jones was not familiar with Howes' qualifications, and did not even want a second helper). Indeed, it was Tomarchio's idea that selected mechanics should have helpers. The Company was primarily interested in using its mechanics to train other employees. So far as the mechanics were concerned, helpers were useful only if and when the helper progressed sufficiently in his work so as to generate income (for the mechanic) which exceeded the helper's hourly wage. As will be discussed, there two interests did not always coincide.

The helpers were paid an hourly wage by the clock, either the minimum wage or slightly more. Usually, but not always, their wages were deducted from the mechanic's earnings. However the Company processed the helpers paychecks (as it did for mechanics and all other personnel), and also paid the helpers' fringe benefits (holiday and vacation pay and employer insurance contributions). When helpers were temporarily transferred

to other work (always at the Company's direction), e.g. to make-ready, the Company paid their wages. In the case of Daniel Piersall, both manager Hendrick and Leary recognized that he had personal problems which were interfering with his work, and therefore that he would be of questionable benefit to Leary.[4] Eventually Leary informed Hendrick that Piersall was simply a "goof-off." On the basis of Leary's opinion, Hendrick terminated Piersall. The mechanics had little authority over their helpers, beyond training them and directing them in their work of helping the mechanics. The mechanics had no authority to hire, transfer, lay off or terminate their helpers, or even to alter their wages, although the mechanics usually absorbed the cost of those wages. If a mechanic felt that he did not have enough work to justify a helper, or that the helper was not working out well, he could so inform the general manager or the service manager, who would then decide what action to take, e.g., suggest that the mechanic give the helper a further try (as Tomarchio initially did with a previous Jones' helper), transfer the helper to other work (as with helper Evans), or terminate the helper (as with Piersall and eventually with Jones' former helper, Kevin McMaster). If the mechanic had attitude or other similar problems with the helper, he would not attempt to discipline the helper. Instead, (as did Leary with Pearsall) he would report the problem to the service manager, who would take such action as he deemd appropriate. The mechanics did not even have authority to alter their helper's working hours, e.g., by letting the helper leave early.[5] If the mechanic felt that his helper was working

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[4] Hendrick initially testified that Leary paid Piersall's wages. However after examining pertinent Company records, Hendrick admitted that this was not true.

[5] General manager Hendrick testified that the mechanics had such authority. However his testimony is inconsistent with the testimony of former service manager Tomarchio, made in a dif-

out well, and deserved a raise, he could so inform the general manager or service manager (as Jones did with Buckalew). As the increase would be coming from the mechanic's pay, the Company had little reason to reject such requests. Thus manager Hendrick testified that it basically made no difference to the Company whether the mechanic was willing to give the helper an increase.

The Company did not, until the third day of the hearing, contend that mechanics with helpers were supervisors under the Act. Instead, the Company stipulated that Felesky, Leary and Jones were eligible to vote in the election, and did not challenge their ballots. At the hearing, I ruled that the Company could litigate their alleged supervisory status in this proceeding. However I also stated, and I now so find, that the Company's prior stipulation may properly be considered as an admission against interest. According to Company counsel, the Company reconsidered its prior position after hearing testimony by former line mechanic Thomas Dixon that he considered John Leary to be a supervisor because he "had people working under him." (In fact, Leary had only one helper). However the Company, and specifically manager Hendrick, who was initially involved in all aspects of the Company's operations, did not learn anything about the status of the line mechanics as a result of this hearing, that he did not already know. If the mechanics with helpers enjoyed supervisory authority, then it is obvious that Hendrick would have been aware of that fact at the time of the representation hearing. Moreover, the evidence adduced with regard to the Com-

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ferent context, that even the mechanics had to request permission to leave early. If the mechanics could not leave early without permission from the manager, then it is unlikely that they could independently grant such leave to their helpers. Moreover, helpers might be needed for temporary transfer to other work. Therefore I credit the testimony of helper Buckalew that if he wanted to leave early he would ask mechanic Jones, who would then check with the service manager.

pany's overall operations in general and line mechanics in particular, indicates that within the Company's operating structure, line mechanics enjoyed the same status regardless of whether they had helpers. All mechanics punched a time clock, received an hourly wage which was based on their individual qualifications as mechanics, and were paid on the flat rate system, i.e., on the basis of their output of mechanical work. In contrast the Company's managers (admittedly supervisors) were paid on a salary plus commission or incentive basis, and did not punch a time clock. The mechanics had no authority over any employees other than their own helpers. Each manager had or shared an office. In contrast each mechanic had only his own work stall. All mechanics were required to wear blue work uniforms. In contrast the managers wore street clothes or executive-type uniforms, except for James Collins, who by his own choice wore the work uniform. The line mechanics, regardless of whether they had helpers, spent nearly all of their time performing mechanical work. In contrast the managers except for Irv Sherbert, performed little or no unit work, and even Sherbert spent much of his time directing the work of the make-ready crew. The managers attended periodic managerial meetings, including meetings concerning the Union's organizational campaign. The mechanics, including those with helpers, were not invited and did not attend such meetings. However all mechanics were required to attend service department meetings, together with other department employees. All line mechanics were subject to the provisions of the Company's "Technicians Job Description," which purported to reflect Company policy, and which indicated close supervisory control over the line mechanics. For example, mechanics could obtain work only from the dispatcher, they could be disciplined for excessive "comebacks," they had to punch a time clock and obtain permission to arrive late or leave early, and they were required to attend

service department meetings and to park in a lot assigned for their use. The Job Description contained 27 provisons, only one of which made any distinction between mechanics with helpers and those without, namely Rule No. 13, which provided that "technicians with apprentices or helpers are responsible for repairs done by their helpers." These provisions are inconsistent with the discretion usually accorded to personnel with supervisory status. As part of its defense on the merits of this case, the Company presented testimony and other evidence to show that the Company had a semi-annual review policy, at least for "non-productive personnel," i.e., those paid on the basis of a fixed salary or hourly wage, in the service department. Although this would include mechanics' helpers, no evidence was presented that the mechanics with helpers were ever involved in this process. It is evident that the limited authority given to the mechanics with helpers was intended to facilitate the work of the mechanics and more importantly, as part of the process of training employees who themselves were potential mechanics, to the point where they could work on their own. As former service manager Tomarchio put it so aptly in his testimony, "You don't need one supervisor for every person working." Tomarchio's explanation is a virtual admission that the mechanics cannot be regarded as supervisors.

The recent Board Decision in *Soil Engineering & Exploration, Inc.*, 269 NLRB No. 7, sl. op. at 3-4 (1984) is dispositive of the Company's contention. That case involved the question of whether drillers with helpers were supervisors under the Act. The Board found that the employer followed a policy of taking disciplinary action against helpers, including discharge, based on the recommendations of the drillers. Nevertheless the Board, reversing the determination of the Administrative Law Judge, found that the drillers were not supervisors. The Board held that "the authority that the drillers' exercised

in directing their helpers' work is no different, in our view, from that any skilled workers has over helpers and apprentices. In so holding, we note that, were we to find the drillers to be supervisors, the result would be a highly disproportionate ratio of one supervisor for each employee. Such a ratio is unrealistic, and incompatible with a finding that the drillers are supervisors."[6] The Board also cited as authority *Southern Bleachery & Print Works, Inc.*, 115 NLRB 787, 791 (1956), enf'd. 257 F. 2d 235 (4th Cir. 1958), cert. denied, 359 U.S. 911, in which the Board found that machine printers with helpers were not supervisors, holding that:

> We have no doubt that almost any employer, when told by a skilled craftsman that his helper is incompetent and that he needs a new helper if he is properly to perform his functions, would accept the judgment of the craftsman. While this may be called effective recommendation, it is inherent in the craftsman-helper relationship.

See also, *Gulf Bottlers, Inc.*, 127 NLRB 850, n. 3, 858-861 (1960), enf. *sub nom United Brewery Workers* v. *N.L.R.B.*, 298 F. 2d 297 (D.C. Cir. 1961), cert. den., 369 U.S. 843 (1962).[7] Therefore I find that the mechanics with helpers were employees under the Act.

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[6] Chairman Dotson dissented on the basis of evidence that the drillers had authority not simply to recommend discharge, but to discharge a helper "on the spot . . . if the driller felt that the helper was not worth his time." In the present case, the mechanics had no independent authority to terminate their helpers.

[7] *Georgia Pacific Corporation*, 225 NLRB 866 (1976), principally relied upon by the Company, is distinguishable on its facts. That case involved the status of lumber jobbers who utilized their own equipment in hauling lumber pursuant to contract with the employer, and used and paid from one to eight drivers to perform this work. The evidence indicated that the jobbers "hire, fire, discipline, assign, transfer and otherwise responsibly direct the drivers of their equipment." The Board found that the jobbers were

V. The Union Organizational Campaign and the Union's Alleged Majority Status

In September 1982 mechanics Joseph Smith and Ricky Kubert contacted the Union. Subsequently union organizer Larry Steele arranged a meeting at Smith's home on November 4. Steele, seven line mechanics (Smith, Kubert, John Chambers, Jim Felesky, Hugh Minter, Jack Ward and Donald West), and Smith's 18-year old daughter Lisa (not an employee) were present. Steele spoke to the employees. He explained that if the Union obtained signed cards from a majority of employees, they would ask the Company to recognize the Union, and if the Company did not, there would have to be an election. Steel also explained the negotiating process. He distributed "single purpose" authorization cards which stated above the signature line "I hereby accept membership in District 65, and of my own free will hereby atuhorize District 65, its agents or representatives to act for me as a collective-bargaining agency in all matters pertaining to rates of pay, wages, hours, or other conditions of employment." Steele explained that an employee became a union member by signing a card. Steele did not discuss initiation fees and dues at this meeting.

Ordinarily, I would defer discussion of the question of majority status until after discussion of the alleged unfair labor practices. However in the present case the Company has questioned the validity of most of the Union's authorization cards, and the questions presented cut across the span of union activity. Additionally, the

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not independent contractors, but were supervisors of the employer. The facts in *Georgia Pacific* are plainly not comparable to those of the present case and the cases cited above. *Land O'Lakes, Inc.*, 204 NLRB 519, 522 (1973) also relied upon by the Company, involved a fact situation similar to that in *Georgia Pacific*, in which the Board held that multiple-owner drivers who "hire and fire the nonowner drivers who operate their equipment," were supervisors under the Act.

fact and timing of union activity, both generally and as to particular individuals, is at least arguably relevant to resolution of some of the unfair labor practice allegations. Therefore I shall take up the question of majority status at this point in the Decision.

During the period from November 1 through January 10, there were 55 employees who were continuously employed in the appropriate unit. The total size of the unit ranged from 59 on November 1 to a peak of 67 on December 7 and 8. Thereafter the unit remained at a level of 66 through December 10. During this period (November 1 through January 10) 12 employees were hired, four were terminated, and another (Walter Livramento) was hired on November 18 and terminated December 9. General Counsel contends that 41 unit employees signed valid authorization cards during the period. Among the card signers, 35 were employed continuously during the period and 5 were hired on or before December 9 and remained employed throughout the period. The remaining signer was Livramento. The complaint alleges that the Union attained majority status as of December 10. However General Counsel in its brief asserts that the Union actually attained majority status on November 17 and maintained that status throughout the period.

Testimony was presented that 6 of the 7 employees present signed authorization cards at the close of the November 4 meeting.[8] Smith, Kubert, Felesky, and West each testified that they read, filled out and signed their respective cards. Smith testified that he saw Minter fill out and sign his card and give it to Steel. Smith, Kubert and West testified in sum that Chambers took a card, but asked Lisa Smith to fill it out because he did not have his glasses. She did so, whereupon Chambers signed the card and gave it to organizer Steele. I find that all six cards were valid. It is settled law that where an

[8] Ward, the seventh employee, was terminated on November 30.

issue is raised as to the authenticity of signatures on cards, they may be authenticated by persons other than the card signer, including persons who witnessed the signing or who received the signed cards from the signatories. *McEwen Manufacturing Company*, 172 NLRB 990, 992 (1968), enf'd. *sub nom Amalmagated Clothing Workers* v. *N.L.R.B.*, 419 F. 2d 1207, 1209-10 (D.C. Cir., 1969), cert. den. 397 U.S. 988. Chambers' card was plainly valid. Even if he were not able to read the card without his glasses, he nevertheless signed the card after organizer Steele truthfully explained its purpose, and he furnished the information for Smith's daughter to enter on the card. (There is no dispute that the information on the card, e.g., Chambers' address, telephone and social security numbers and wage rates, were correct).

Three more employees signed cards on November 8. Thomas Dixon and Carroll (Fred) Pierson authenticated their respective cards. Pierson subsequently became a principal union adherent. Ricky Kubert testified that he asked Mechanic Ronald Kawecki to sign a card. Kubert explained that they were trying to get in a union and that Kawecki would become a member by signing the card. Kawecki said that he wanted to join. He filled out and signed the card and returned to to Kubert. It is immaterial that Lisa Smith entered the Company's name and address and service department on the cards, or that some other person entered other job information on Dixon's card. It is evident that the employees signed the cards in connection with their employment with the Company. Therefore even if such information was entered after the employee signed the card it would not alter the meaning or significance of the card.[2] Compare, *Laclede*

[2] Pierson testified that the Company's name and address and his job title were written on his card when he signed it. In view of the consistent pattern of cards in which the Company's name and address and service department were entered by Lisa Smith, I find that such information was entered by her on blank cards at the

Cab Company, 236 NLRB 206, 210 (1978), in which the Board held as valid, a card which was signed in blank. Therefore I find that the cards were valid.[10]

On November 9 additional cards were solicited in the shop, and there was another meeting at Smith's home. Karl Jones testified that he signed his card at the meeting after organizer Steele asked him to join the Union. Having found Jones to be an employee, I find that his card is valid. Mechanic Robert Russell testified that he also signed his card at the meeting. Russell testified that he signed, dated and filled in all of the card except for the Company's name and address. Russell testified that he thought his wife entered that information, although the handwriting appears to be that of Lisa Smith. For the reasons discussed in connection with similar cards, I find that Russell's card was valid. Joseph Smith testified that on November 9 he obtained signed cards in the shop from painter Bret Anderson and mechanic Darryl

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November 4 meeting. It is unlikely that employees would have consistently failed to fill in such information. Therefore by signing the cards the employees ratified such information, just as they ratified the printed text of the card.

[10] The Company asserts (Br. 223-225) that the Board will not determine majority status based on cards containing "irregularities," e.g., information subsequently added, erasures, or printed names, absent personal authentication by the signator. The assertion is incorrect. See, *Amalgamated Clothing Workers v. N.L.R.B.*, *supra*, 419 F.2d at 1209, n. 1; *Daybreak Lodge Nursing & Convalescent Home*, 230 NLRB 800, 804 (1977), enfd. 585 F.2d 79 (3rd Cir., 1978). The Company's argument might be persuasive in a situation involving a serious discrepancy which could only be adequately explained by the signer. Thus in the present case, with regard to the card of Roy Epling (which will be discussed), evidence indicated that Epling was not employed by the Company when he signed the card. In these circumstances I ruled that General Counsel would probably have to produce Epling in order to explain the circumstances under which he signed the card. However the cards signed on November 8, and other cards containing similar entries, do not present a comparable problem.

Horan. Smith testified in sum that each employee signed, dated and completed the card, except for portions which were completed by Lisa Smith (Company name and address and department) and returned the card to him. Smith also testified that Horan told him that he was interested in joining the Union. Horan's card was dated "10/9/82." However there was no card solicitation prior to November 4. It is evident that Horan incorrectly dated the card. I credit Smith, and I find that the cards were valid. Body Shop employees Thalsberg Brown and Sedgewick Cole each testified concerning their respective cards. Brown testified that Joseph Smith gave him a card in the shop, and that he signed, dated and completed the card (except for the Company name and address and department, which were evidently completed by Lisa Smith) and returned the card to Smith. Brown was subsequently promoted to foreman, but he nevertheless voted in the election. I find that Brown's card may properly be considered as evidence of the Union's status until January, when he was promoted to a supervisory position. Cole testified that he also obtained a card from Smith in the shop, signed, dated and completed the card except for the portion completed by Lisa Smith), and returned the card to Smith. Cole testified that Smith told him that he would become a member if he signed, that the purpose of the card was to "get a union going" and that "if we get a majority vote maybe we could [get] a union in the shop." However Smith did not say that there would be an election. I find that his card was valid. See, *N.L.R.B.* v. *WKRG-TV, Inc.*, 470 F. 2d 1302, 1317-18 (5th Cir., 1973); *Peerless of America, Inc.* v. *N.L.R.B.*, 484 F. 2d 1108, 1117-18 (7th Cir., 1973).

Ricky Kubert testified that he obtained signed cards from body shop employees Kenneth Boston and Henry Brown and mechanic John Grubb, all dated November 9. Kubert told the employes that they would become

union members by signing the card, and that he did so in accordance with organizer Steele's explanation. In each instance the employee signed, dated and completed the card (except for the portion filled in by Lisa Smith), and returned the card to Kubert. I find that the cards were valid.

Smith and Kubert obtained additional signed cards at work on November 10, 11 and 12. Smith testified that he gave cards to dispatcher Joseph Wellman and (then) porter Daniel Piersall, asked each employee if he was interested in joining the Union and was willing to sign a card, and told each to read the card. Smith further testified that each employee filled out, dated and signed the card and returned the card to him. The cards are dated November 10 and 11 respectively. I find they are valid. Kubert testified that he gave a card to body shop employee Archie Brown, that they had previously discussed the Union and Brown indicated that he wanted to sign a card, and that Brown signed and completed the card (except for the portion filled out by Lisa Smith), and returned it to him. The card dated November 10, is valid. Mechanic's helpers John Howes and Edward Buckalew each authenticated their own cards. Both are dated November 10. Howes testified that he got the card from Smith, read, completed, dated and signed the card, and returned it to Smith. Buckalew testified that he got his card from Kubert, read, completed, dated and signed the card, and returned it to Smith. Buckalew testified that Kubert told him that the purpose of the card "was to organize a union, get an election, and have the UAW represent us." However Kubert did not tell Buckalew that the cards would be used only to obtain an election, or that the Union would seek representative status only through an election. I find that the cards of Howes and Buckalew are valid. Parts counterman John Lawrence authenticated his own card, dated November 12. Lawrence testified that Smith gave him the card as they

were leaving for lunch, and that he took the card, read, filled out and signed it and returned the card to Smith about 30 minutes later. Lawrence testified that Smith asked him if he was interested in getting the Union into the shop and if so, that he should fill out the card. Lawrence answered that he was interested, and that he previously belonged to a Union. Lawrence further testified that Smith also said that "they were trying to find out how many people were interested and to fill out the cards would give them an idea if they had enough people in order for the Union to come in to have a vote at a later date," and that if there were enough people interested in it, that later on there would be an election to find out if the Union gets in or not." However Smith did not tell Lawrence that the cards would be used only to obtain an election. Indeed, he specifically told Lawrence to sign the card if he was interested in having the Union in the shop (not if he was simply interested in having an election). As matters turned out, Smith's prediction of an election was correct. The card is valid. *WKRG-TV, Inc., supra*; *Peerless of America, supra.*

Parts counterman Carlos Cully testified that he obtained his card from Sedgewick Cole, and that he read, completed and signed the card and returned it to Cole. The card is dated November 12. Cully testified that before signing the card he spoke to some of the mechanics, and that he did not discuss the purpose of the card at the time he signed it. However, according to Cully, Cole subsequently told him that the purpose of the card was "to get the ball rolling," and that when Cully asked him to explain what he meant, Cole failed to do so (although Cully admitted that he did not give Cole time to explain). As Cole did not "deliberately and clearly cancel" the "clear language" on the card "with words calculated to direct the signer to disregard and forget the language above his signature," the card was valid. *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 606-607 (1969).

There was considerable organizational activity during the week of November 15, particularly among the make-ready and other unskilled employees. Joseph Smith testified that he gave janitor Richard Allsup a card, explaining that he should read the card, and to sign it if he wanted to join the Union and have the Union represent him. Smith testified that Allsup signed, dated and completed the card and returned it to him. The card, dated November 16, was valid. Porter Patrick Evans authenticated his own card. Evens testified that he got his card from Smith and Kubert, read it, filled it out and signed it, and returned the card to Smith. The card, dated November 16, was valid. Porter Michael Oliver's card, dated November 17, was authenticated by Oliver and by Sedgewick Cole, who gave him the card. Oliver testified that he read, signed and completed the card. Cole testified that he told Oliver that conditions were bad, that the Union might help, and that they were trying to get up a union. The card was valid.

Karl Jones testified that on November 16 he spoke to make-ready employees Bruce Bennett, Donald McMullen and Robert Sanford, and gave them authorization cards. Jones testified that he asked the employees "if they wanted to sign the cards to have the UAW represent them." He told them to read and make sure they understood the cards, and offered to answer any questions. He also told them that the cards would show how many employees would support the Union, and would also be a way for the Union to contact the employees. Jones testified that he told them that the initiation fee was ten dollars and that monthly dues would probably equal two hours' pay. Bennett and McMullen each filled out and signed a card that day. Sanford returned a signed, dated and completed card to Jones the next day, after discussing the matter with his parents. Sanford, Bennett and McMullen were each presented as Company witnesses. Sanford did not testify concerning his card. Bennett

testified that dues and initiation fees were not discussed when he signed his card, but he did not otherwise contradict Jones' testimony. McMullen testified that at the "first" union meeting, organizer Steele said the initiation fee was $10, but that if the Union came in, those employees who did not pay their fee would have to pay $80 or $90. According to McMullen, this meeting took place at a restaurant, Mike's Crab House, and he probably signed the card after the meeting, although he could not remember whether Smith or Steele gave him the card. So far as indicated by the present record, the only union meeting at Mike's Crab House took place on December 14. McMullen's card is dated November 16. Ricky Kubert testified that at a union meeting Steele explained the Union's initiation fee and due policy. Steel told the employees that the initiation fee was $10, that they could pay the fee any time and that dues would not be collected until the Company and the Union signed a contract. In light of McMullen's incredible testimony concerning the sequence of events, I credit Jones and Kubert. Jones unequivocally made clear to the employees that by signing the cards they were designating the Union as their representative. Jones' statement that the cards could also be used for informational purposes, did not denigrate from their use for representational purposes. The cards were valid.

Body shop employee Peter Maloney testified that he read, completed, dated and signed his card, which is dated "Oct 15-82." Maloney testified that he did not know the exact date on which he signed the card. The card was stamped as received in the Board's Regional office on November 24, the day the Union filed its election petition. Maloney quit the Company on December 6. I find that Maloney misdated the card, and that he probably signed the card on Monday, November 15. In any event the card should be considered as having been signed not later than November 24, when it was submitted to the

Regional office. *Gordonsville Industries, Inc.*, 252 NLRB 563, 596-597 (1980), enf'd. 109 LRRM 2936 (D.C. Cir., 1982). I find that Maloney's card is valid evidence of the Union's status until December 6, when he quit his job.

Joseph Smith testified that on November 16 he gave a card to mechanic James Rose, and asked if Rose's fiancee, Tracy Snodgrass, a make-ready employee, would be interested in joining the Union. Rose said she probably would. Smith gave Rose a card and Rose gave it to Snodgrass. Smith testified that he saw Snodgrass fill out the card and return it to Rose, who gave it to Smith. The next day Rose quit his job. Snodgrass, who married Rose in the summer of 1983, was presented as a Company witness. Snodgrass testified that Rose gave her the card, which was already filled out, and told her to hurry and sign it and he would explain later. Snodgrass signed the card without reading it. That evening Rose told her that it was a union card. Snodgrass testified that at the time she signed the card she was not aware of the organizational campaign, but later learned of the campaign, and was told that the card would bring a union into the shop. However she did not ask the Union to return her card.

I credit Snodgrass' explanation. Smith testified that he thought Snodgrass signed the card in the morning, although Snodgrass was a high school student who worked from 4 p.m. to 9 p.m. Therefore I do not credit Smith's testimony that he saw Snodgrass fill out the card. The evidence fails to indicate any organizational activity among the make-ready employees prior to November 16. Therefore Snodgrass, who reported to work in late afternoon, may not have heard any talk about the Union before she signed the card. Snodgrass trusted Rose, and her trust was based on their personal relationship. However, figuratively speaking Rose wore two hats. Rose was

Snodgrass fiancee, but he was also acting as a union representative. In soliciting union memberships, Rose was obligated to adhere to the same standard of fairness as were leading union adherents like Smith and Kubert. Instead, Rose took advantage of his personal relationship with Snodgrass, and deprived her of an opportunity to consider or even read the card. Therefore I find that Snodgrass' card cannot be considered as evidence of the Union's status.

By letter dated November 23 the Union requested recognition from the Company, and the next day the Union filed its petition for an election. The evidence fails to indicate that the Company ever responded to the Union's request. As of November 24, 32 employees had by signing cards, validly designated the Union as their bargaining representative. During the period from November 17 thru 28 there were 62 employees in the appropriate unit. Therefore as of November 24 a majority of employees in the unit had designated the Union as their representative.

Subsequent organizational activity was principally but not exclusively directed at new employees. Walter Livramento, who signed a union card dated November 25, testified that porter Evans gave him his card. Livramento testified without contradiction that Evans told him that the card was to get the employees into the Union, that the Union meant job security, that there would soon be an election, and that "we had to give $10 to be . . . in the election." Evans, who himself had only recently signed a card, may well have garbled his information. There is no evidence that organizer Steele or any principal union adherents ever told anyone that they had to sign a union card in order to vote in the election. However Livramento was a new employee, and may well have believed Evan's statement. I find that Evans made a material and coercive misrepresentation concerning the

purpose of the card. Therefore Livramento's card cannot be considered as evidence of the Union's status.

Joseph Smith testified that make-ready employee James Marshall sought him out and asked for a card. Marshall told Smith that he had been out sick, but wanted to join the Union. Marshall took his card to the washroom where he filled out and signed the card, and then returned it to Smith. Marshall was called as a Company witness, but he did not testify concerning his card. The card, dated December 1, is valid. As of that date there were 64 employees in the unit. However by obtaining Marshall's card the Union was able to retain its majority status.

Porter Roy Epling's card is dated December 3. Epling and Smith testified in sum that Pat Evans' introduced Epling to Evans in the shop. Smith asked Epling if he wanted to join the Union, and Epling answered that he did. Smith told Epling that the card gave him the right to bargain with the Company through the Union, that he should read the card, and that if he agreed to join the Union and accept union representation he should sign the card. Epling read, dated, signed and completed the card (except for the Company's name and address and Epling's date of employment, "12-3-82," which was entered by Smith. Smith and Epling initially testified that Epling signed the card on his first day at work, although both subsequently backed away from this assertion. In fact, as stipulated by the parties at the outset of this hearing, and as confirmed by the Company's records and Epling's own paystubs, Epling began working for the Company on Tuesday, December 7. Ned Tomarchio testified that he interviewed Epling (who had been recommended by Evans) on December 3, that Epling filled out a job application on that date (which was introduced in evidence), and that he told Epling that he would let him know. Tomarchio further testified that he called Epling on December 6 and told him to report to work the next

day. I credit Tomarchio, but I find that the card is valid because Epling signed the card "in anticipation of employment with" the Company. *Riviera Manor Nursing Home, Inc.*, 200 NLRB 333 (1972), enf'd 487 F. 2d 1405 (CA 7, 1973). Epling knew that there was a job opening and that he had a good chance of being hired, and he was sufficiently familiar with his prospective job as to be able to enter his department, job, hours and rate of pay on the authorization card. The Company argues that the card was not valid because Epling had not made "definite arrangements" for his employment as of December 3, and points out that in *Riviera Manor*, the Board found that the signer in question had made such arrangements. However neither the Board nor the Court of Appeals indicated that this was the minimal standard. Rather both the Board and the Court held that the card in question would be valid if signed "in anticipation of employment." Thus the Court initially remanded the case to the Board because the Board failed to make a determination as to whether the individuals in question had been accepted for employment or were employees when they signed their authorization cards, "or at least had signed their cards after arranging their employment *or in anticipation of employment by respondent*," 80 LRRM 3221, 3222 (7th Cir., 1972). (emphasis added). Therefore Epling's card is valid evidence of the Union's status as of December 7, when Epling commenced working for the Company. At this point, following the departure of Peter Maloney, the Union had 33 valid cards in a unit of 67 employees, i.e., one short of majority status.

Kevin Hall and Scott Owens began working for the Company as porters on December 2. Joseph Smith testified that he asked them at work if they wanted to join the Union. Smith explained that "we were thinking of getting the United Autoworkers to represent us." They said they would like to join. Smith testified that he gave them cards which they read, filled out, signed and re-

turned to Smith. There was no discussion of dues or initiation fees. The cards dated December 8, were valid. Jack Winemiller began working for the Company on December 6 as a metal employee in the body shop. Ricky Kubert testified that they talked about the Union at work. Winemiller said that he wanted to join the Union. Kubert gave him a card. Winemiller said he was busy, but would take the card with him. The next day Winemiller returned the card, which was filled out, dated and signed, to Kubert. Winemiller was called as a company witness, but he did not testify concerning his card. The card, dated December 9, was valid.

John Shobe began working as a metal employee in the body shop on November 29. Joseph Smith testified that he gave Shobe a card in the shop. They had previously discussed the Union. Shobe said that he wanted to join the Union. Smith told Shobe to read the card, and sign if he agreed with it. Shobe filled out and signed the card, and returned it to Smith. The card, dated December 10, was valid. On December 14 there was a union meeting at Mike's Crab House. Joseph Smith testified that after the meeting, service writers David Kondracki and Norman Pennington each asked him for an authorization card. Smith told them that they would become union members by signing the card. Kondracki went to the washroom and returned his card to Smith, completed, dated and signed. Pennington similarly returned his card to Smith the next day in the shop. As previously discussed, I find that organizer Steele did not make any misrepresentations at the December 14 meeting. The cards, both dated December 14, were valid. Smith further testified that he gave a card to service writer Charles Burry in the shop. Smith asked Burry if he was interested in joining the Union, and Burry said he was. Smith told him to read the card and sign it if he agreed. Burry took the card and shortly thereafter filled it out, signed it and returned it to Smith. The card, dated December 16, was valid.

In sum, I find that by December 16 the Union had obtained 40 valid authorization cards in a unit of 66 employees. Therefore the Union was and remained in possession of valid authorization cards from a majority of the unit employees.

VI. The Alleged Unfair Labor Practices and the Objections to the Election

General manager Hendrick testified that he learned about the Union's election petition on November 25, but that he heard about a week earlier that there was organizational activity in the shop. He further testified that he learned that Smith, Kubert and Pierson were the principal union activists, although other employees wore union insignia. On and after December 10 the Company sent letters and distributed literature to the unit employees in which it expressed its opposition to unionization. General Counsel does not contend that the literature was unlawful. However General Counsel does contend that the Company responded to the Union's campaign by other, unlawful means.

A. *Alleged unlawful threats, interrogation and solicitation*

1. The Christmas party, and alleged threats and interrogation by John Koons in December

On Saturday evening, December 18, the Company held its annual Christmas party at the Bay Ridge Restaurant in Annapolis. By this time the election campaign was well under way. As will be discussed, the events of that evening marked a watershed in the Company's campaign against unionization, and also tend to shed light on the nature of that campaign both before and after as well as on December 18. Therefore instead of proceeding in chronological order, I shall commence with the events of

that evening. The party began at about 8 p.m. Later that evening, president Koons' driver informed general manager Hendrick that he smelled gas in Koons' motor home, which was parked outside the restaurant. Hendrick determined that the gas was turned on. He returned to the restaurant, but encountered Ricky Kubert and sales manager Debini in the hallway. Hendrick demanded to know who turned on the gas, and made statements which suggested to Kubert that Hendrick was accusing a union adherent or adherents.[11] At this point Fred Pierson was summoned to the hallway. Hendrick's remarks led to a heated argument between Hendrick and Pierson, and they nearly came to blows. John Koons was summoned to the scene, and he attempted to calm them down. In the meantime other persons gathered in the hallway, including service department manager Tomarchio and mechanic Donald West. At this point the conversation turned to the Union, and the testimony is in dispute as to what Koons said on the subject. Kubert and Pierson testified in sum that Koons said that he didn't need Annapolis, that he had a place in Florida and could close down and move there, and life would go on without Koons Ford of Annapolis. They talked about health insurance coverage. West testified that Hendrick said the Company did not have to agree to that. According to Kubert, Koons said that he did not have to "negotiate' to anything. However Kubert subsequently testified that Koons said he did not have to "agree" to anything. Pierson said that if there was a strike, the Company could not get cars across a picket line. Koons retorted that the Company could get cars from other dealers. Kubert and Pierson testified in sum that Pierson said that he would not have put his job on the line if he did not feel so strongly about the Union, whereupon Koons replied "you already have." Donald West corroborated their testimony

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[11] The Union withdrew an allegation that the Company thereby acted unlawfully, and that issue is not presented in this case.

in this regard. One of Koons' associates attempted to break up the conversation. However when Pierson saw Tomarchio, he pointed to him and said that he was responsible for the Union. Koons then called Kubert and Pierson aside and they talked further. The following Monday Tomarchio tendered his resignation. It is undisputed that on Monday, Koons told Kubert and Pierson that he didn't want any hard feelings, that what was said at the party was forgotten, and that no action would be taken against anyone.

Koons, in his testimony, was evasive about the most crucial aspect of the employees' testimony, and indeed was almost apologetic. According to Koons:

> I don't even remember discussing it about them putting their job on the line. I said, you know, I mean I never thought that I have—had no intention of that. In fact, you know, Fred, you know, even throughout this whole thing we considered possibly promoting him and still might. So, it was just the opposite.

Koons further testified that he told the employees that the Company could not close the dealership because it was not allowed to do so, and that the Company planned to stay in business. General Manager Hendrick, who also testified concerning the Christmas party incident, gave confused and contradictory testimony concerning Koons' remarks, including versions different from that of Koons. At one point Hendrick testified that he was not sure whether Koons said that Pierson's job was never on the line, or could be on the line, or was already on the line. At another point Hendrick testified that Koons told the employees that their jobs were probably on the line if the Company didn't have any business, and that the Company would close if it went bankrupt. Ned Tomarchio, the Company's other witness concerning the hallway incident, testified only concerning the incident involving himself.

Pierson also testified concerning a conversation with Koons on the shop floor about a week before the Christmas party. Pierson testified that Koons asked him why they needed a union. Pierson answered that they needed someone to represent the employees in negotiations. Koons then asked why the employees didn't come to him to negotiate any problem. Pierson answered that they didn't think they would be treated fairly. Pierson testified that Koons said he didn't need the dealership, and could turn it into an apartment building or an office building. Pierson answered that he was sorry that Koons felt that way, and that the employees were not out to rape him. Pierson testified that he did not know whether anyone overheard this conversation, but that he talked to four other employees about it. Koons in his testimony was also somewhat evasive and defensive about this conversation. He testified that he did not recall this particular conversation, although he probably spoke to Pierson. With regard to closing the dealership, Koons tended to testify concerning his intentions rather than what he actually said. Koons further testified that he did not ask the employees about why they needed a union, but did "apologize for lack of communication that seems to have developed down there." In fact, Koons did not display any interest in lack of communication until the Christmas party, when he learned that the employees regarded Tomarchio as responsible for such failure of communication.

With regard to the conversation at the Christmas party, I credit the testimony of the employees to the effect that Koons said he could close the dealership, and told Pierson that he had put his job on the line by his union activity. As discussed, the testimony of Koons and Hendrick was contradictory and evasive concerning these matters, and Koons came close to admitting that he told Pierson that he put his job on the line. In the context in which these statements occurred, namely, the argu-

ments about the Union, Koons' statements plainly constituted a threat to close the dealership if a union came in, and an implied threat that the Company would or could discharge employees because of their union activity. Koons did not make a prediction which was carefully phrased on the basis of economic or other objective considerations. Indeed Koons admitted that if he were inclined to close the dealership for economic reasons he would have done so in January, 1982. The employees were aware that Koons has other dealerships, including one in Florida. In the circumstances, including Koons' outspoken hostility to unionization, the employees could reasonably infer that Koons would close the Annapolis dealership rather than accept a union. Therefore the Company, by Koons, violated Section 8(a)(1) of the Act. However in light of Kubert's conflicting and uncorroborated testimony, I find that Koons did not say that he would not negotiate with the Union. I further credit the testimony of Pierson concerning his earlier conversation with Koons. I find in the context of the conversation, that Koons similarly threatened to close the dealership rather than accept unionization. I further find that Koons unlawfully interrogated Pierson concerning his attitude and that of other employees toward the Union. Koons had no legitimate reason to question Pierson. Rather in light of subsequent developments, which will be discussed, it is evident that Koons was seeking information for the purpose of learning which benefits he could promise or grant to the employees in order to discourage support for the Union. Koons did not give Pierson any concurrent assurance against reprisal. Rather Koons accompanied his interrogation with a threat to close the dealership. Therefore the Company, by Koons, violated Section 8(a)(1) by unlawfully interrogating Pierson and by threatening to close the dealership if the employees voted in the Union.

The Company contends in its brief that no finding of unlawful conduct is warranted because of (1) Koons'

apology to Kubert and Pierson on the Monday following the Christmas party, and (2) a speech by Koons on January 10, in which he denounced alleged rumors that the dealership would close, and asserted that he had no intention of closing the dealership and would bargain in good faith if the employees selected the Union as their representative. However such statements would not preclude a finding that Koons previously threatened to close the dealership or threatened other reprisal. Rather these subsequent statements are relevant to the questions of (1) whether a conventional cease and desist order is warranted, and (2) whether the subsequent statements mitigate against the propriety of a remedial bargaining order. As these questions necessitate consideration of the Company's overall course of conduct, I shall defer further discussion of these questions to a later point in this Decision.

2. Alleged unlawful threats, interrogation and solicitation by make-ready manager Irv Sherbert

Irv Sherbert was a relatively low level supervisor. However he was looked upon as something of a father figure by the young, unskilled employees including not only the make-ready employees under his direct supervision, but also the porters and helpers who performed comparable, beginning level work. Therefore he was in a position to exert strong influence on these employees, who trusted him. General Counsel presented seven present or former employees who testified concerning alleged unlawful statements by Sherbert. Karl Jones testified that in late November or early December he was present in the make-ready office which Sherbert and four make-ready employees (Bennett, McMullen, Sanford and Vester). Sherbert said that he heard they were trying to get in a union, and asked why. Jones explained the advantages of unionization. Jones testified that Sherbert responded that if the Union got in it would not stand

behind the employees, and that the employees would not be able to get discounts on parts, leave work early, or work on their own cars in the shop. Pat Evens testified concerning three conversations in the make-ready office after work, when pursuant to their usual custom, Sherbert and the employees were drinking beer and talking. These conversations took place in late November and December. Evans testified that in the first conversation, at which make-ready employees Bennett and Tom Lewis were present, Sherbert said that if the Union came in, the employees would not be able to wash their own cars, because he was the manager. Evans testified that in the second conversation, at which employees Bennett and Epling were present, Sherbert said that if the Union came in, "the last two hired would be the first two fired because it would go by seniority and they probably wouldn't need all that help." At the time Epling, who was a porter, was the most recently hired employee in the service department. Bennett, who began working for the Company in August, 1982, was the least senior employee in make ready after the termination of Walter Livramento on December 9. Epling testified concerning such a conversation, but his version differed from that of Evans and was internally inconsistent. Epling initially testified that he, Evans, Bennett and two other employees (apparently McMullen and Vester) were present when Sherbert said that he was the last hired, and that he and Bennett would probably be the first to go if the Union came in. However Epling subsequently testified, and so indicated in his affidavit, that Sherbert did not mention any names, but that he (Epling) suggested that Sherbert was referring to himself and Bennett. Evans testified that at the third conversation, at which employees Sanford, Bennett and Lewis were present, Sherbert said that if the Union came in they would not be allowed to drink beer as they were doing then. Epling also testified that on occasion in the shop, Sherbert asked him what he thought of the Union. When Epling indicated that he would wait to

decide, Sherbert told him that the Union was a bunch of bull and that he should talk to the boys his age and tell them that the Union was no good. Epling did not testify that Sherbert ever followed up on his request. Epling further testified that on this occasion Sherbert told him that he was the "first" (sic) hired and could be the first to go if the Union came in.

Mechanic James Felesky testified that on one occasion in the make-ready office, Sherbert told him that if the Union was voted in, Koons would force a strike by "not agreeing to anything that the Union demanded," and then hire permanent replacements for the employees, who would lose their jobs.[12] Used car mechanic Robert Russell testified that on one occasion when he stopped at the make-ready office, Sherbert told him that if the Union got in the employees would not be able to work on their own cars, but he (Sherbert) could do so at any time, and would do so for spite.[13] Mechanic's helper Ed Buckalew testified concerning two conversations with Sherbert in the make-ready department. Buckalew testified that in the first conversation, Sherbert said that if the Union came in the employees would lose privileges, and would "probably" lose the privilege of working on their own cars, also known as "hobby night," i.e., the first and third Wednesday evenings of each month, when employees were permitted to bring in their own cars and make repairs, clean or otherwise service them free of charge. However

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[12] In his affidavit to the Board, Felesky stated that he was never "personally" threatened or harrassed by anyone in the Company. However in the same affidavit Felesky described the above conversation. Felesky's conclusory statement does not impeach his testimony concerning the conversation.

[13] In his investigatory affidavit, Russell stated that Sherbert said this to himself and several other employees. However Russell's information concerning other employees may have been based on hearsay. Therefore his affidavit is not necessarily inconsistent with his testimony that he did not know whether anyone overheard his conversation with Sherbert.

on cross-examination Buckalew testified that Sherbert said there was a "possibility" that hobby night would be discontinued. Buckalew testified that in the second conversation, at which John Howes was present, Sherbert again said that the employees would probably lose privileges, including hobby night, if the Union came in, and that any employee who did anything wrong would be fired. Howes partially corroborated the testimony of Buckalew. Howes testified that in one conversation Sherbert asked their opinion of the Union. When they said they were undecided, Sherbert told them they did not need the Union, and that if the Union came in they would probably lose hobby night. Howes testified that in the second conversation, Sherbert said that he had experience with unions, and that unions caused employees to lose their jobs if they goofed or were late even once. In response to requests by Company counsel prior to this hearing, Howes and Buckalew each signed written statements in which they stated that Sherbert did not threaten them. However as the statements failed to indicate just what Sherbert did tell them about the Union, the conclusory statement that Sherbert did not "threaten" them has no evidentiary value, and does not impeach the testimony of the employees.

Sherbert, in his testimony, came close to admitting the allegations of the Complaint. Indeed, he corroborated much of the testimony of General Counsel's witnesses, and even when his version differed from those of the employees, Sherbert's version would in some cases also constitute an unlawful threat. Sherbert testified that he told Felesky that if negotiations did not go the way "the people" wanted, the Company might force a strike by refusing "to give anybody anything" and then hiring permanent replacements and putting everyone out of a job. Sherbert initially testified that he said the employees would "have to" go on strike, but he subsequently attempted to water down this admission by asserting that

he said this "might" happen. In light of these admissions, Sherbert's followup assertion that he did not say that Koons would force a strike or refuse to negotiate, plainly was not credible. Sherbert admitted that he told Jones "what might become of leaving early," if the Union came in, and "what might happen" if the negotiations went the way the Company thought, and that the employees might lose the privilege of working on their cars. Sherbert went on to testify that he told the employees that they would not be able to bring in their cars unless it was agreed to "in the contract." However, hobby night was an existing privilege which would not depend on a contractual provision, and which could not be taken away unless the Union specifically bargained it away, i.e., contractually or otherwise agreed that employees could *not* work on their own cars. *See, Yellow Cab Company*, 229 NLRB 1329, 1353-1355 (1977), enf'd. in pertinent part, 603 F. 2d 862, 889-890 (D.C. Cir., 1978). Therefore Sherbert's testimony, even if credited, was tantamount to an admission that he threatened the employees with loss of hobby night if the Union came in.[14] Sherbert also admitted that he told the employees that they would "probably" lose the privilege of drinking beer after work on the premises, although he said nothing about negotiations concerning the subject. Again, Sherbert's testimony was tantamount to an admission of an unlawful threat. Sherbert testified that he did not recall saying that there would be no parts discount, or that employees would be discharged if they slipped up or were late once. However Sherbert admitted that he "figured" that the attendance rules would be strict if the Union got in, and that he told the employees that he would not be as close

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[14] At one point Sherbert testified that he permitted Buckalew to bring in his car during working hours, but told him that if the Union came in he would "have to wait to the regular time," i.e. hobby night. If so, then Sherbert's statement constituted a threat that the Company would restrict the privilege if the Union came in.

with them as he had been. Sherbert initially testified that he did not threaten any employee with layoff. However Sherbert eventually admitted after considerable evasion that he told the employees "the last man hired, you know . . . gets replaced," and that he specifically referred to layoff.

The Company also presented the testimony of four present and former make-ready employees (Robert Sanford, Bruce Bennett, Donald McMullen and Charles Vester), concerning the statements allegedly made by Sherbert. Bennett testified that he did not remember Sherbert discussing what would happen if the Union came in, or specifically making any reference to hobby night or following seniority in layoffs. Vester flatly testified that Sherbert did not say how he felt about the Union, and in sum, that he never indicated what if anything the employees might lose, other than to say that specific matters would have to be negotiated. Sanford testified that Sherbert said that everything was negotiable, but did not say that the employees would lose anything if the Union came in. Sanford further testified that he did not recall Sherbert saying anything about no drinking, or about last hired, first to go. Sanford further testified that he knew that Sherbert was against the Union, based on what he said, but he failed to indicate what Sherbert said which led him to that conclusion. In light of Sherbert's own admissions, their testimony is plainly incredible and worthless. Bennett did testify that Sherbert asked his opinion on the "union issue." Bennett thereby contradicted Sherbert's testimony that he never asked the employees whether they were for or against the Union.

I credit the testimony of General Counsel's witnesses. I specifically find that Sherbert threatened that Koons would force a strike by not agreeing to any union demand, i.e., by unlawfully entering negotiations with a closed mind, which would cause the employees to lose their jobs. I further find that Sherbert expressly threat-

ened Epling, and subsequently impliedly threatened Epling and Bennett with layoff if the Union came in. As of November and December the Company was in the process of hiring additional employees, and anticipated that business would improve. Nevertheless, without giving any objective basis, Sherbert equated unionization with a need for fewer employees, and indicated to the employees that they would probably be laid off (and not simply that seniority would be followed in the unlikely event of an economic layoff). I further find that Sherbert, without any objective basis and without any reference to the give-and-take of good faith contract negotiations, threatened the employees with loss of discount on parts and the privileges of working on their own cars, leaving work early, and drinking beer after work on Company premises, and further threatened them with severe discipline in the form of discharge for making one mistake or being late once. At no time did Sherbert suggest that the employees might gain anything, or even that the Union would seek anything to compensate for those losses. A union does not enter contract negotiations for the purpose of persuading the employer to take away benefits from its employees. It is evident that Sherbert was sending a clear signal to the employees that in reprisal for unionization, the Company would deprive or seek to deprive the employees of their benefits and privileges, and would impose or seek to impose severe discipline upon them. Moreover, an employer violates Section 8(a)(1) by telling its employees without any objective basis in fact, that a union would seek more onerous working conditions if selected as the employees' representative. *May Department Stores Company d/b/a The M. O'Neill Company*, 211 NLRB 150, 151 (1974), enf'd 76-LC Par. 10834 (D.C. Cir., 1975); *H. A. Kuhle Company*, 205 NLRB 88, 104-105 (1973). Therefore Sherbert's threats were unlawful even to the extent that he suggested that the Union would be responsible for these horrible consequences. I further find, on the basis of Sherbert's own

admission, that Sherbert violated Section 8(a)(1) by threatening the employees that if the Union came in he would not be as close with them as he had been. *Wilker Bros. Co., Inc.*, 226 NLRB 1371, 1372 (1978), enf'd. in pertinent part, 652 F. 2d 660 (6th Cir., 1981). The Company's argument that Sherbert was simply a garrulous, friendly fellow who expressed his own opinions as one worker to his fellows, is not persuasive. As General Manager Hendrick admitted, the Company's managerial and supervisory personnel were kept well informed as to what they could and could not tell the employees. There is no suggestion that the Company ever censured Sherbert or disavowed his remarks. Rather, as has been and will be discussed, Sherbert's statements were consistent with the statements of other supervisors in the chain-of-command, up to and including John Koons. Therefore I find that the Company, by Sherbert, violated Section 8(a)(1) of the Act by the foregoing threats. However I shall defer my concluding findings with regard to the alleged unlawful interrogation and solicitation until the next section of this Decision.

3. Alleged unlawful threats, interrogation and solicitation by service manager Ned Tomarchio

General Counsel presented testimony by five percent or former employees concerning alleged unlawful statements by former service manager Tomarchio. Mechanic Karl Jones testified that on one occasion in late November, he went to Tomarchio's office to discuss a work problem. Tomarchio raised the subject of the Union, asserting that Jones did not have to discuss it. Jones answered that he had nothing to hide. Tomarchio asked if they were trying to get in a union. Jones said they were. Jones testified that Tomarchio said, in a sarcastic tone, that it was a "good idea," and went on to assert that if the Union came in "you won't be able to recognize that

many faces in the back of the shop because if they can't stand my rules, they'll never be able to stand up to the union rules." Jones testified that Tomarchio also told him that if the Union came in the employees would not be able to work on their own cars, or leave work early (even with permission), and the parts department would not be able to give them discounts on parts. Jones testified that on a later occasion, when they were returning together from Jessup, Maryland after delivering cars to the State of Maryland, Jones referred to the fact that he was working on a friend's car (outside the dealership and on his own time). The Company permitted this practice if it did not conflict with shop work or deprive the Company of income. Jones testified that Tomarchio said that the Union would not allow the employees to do this, and that they could be fined or fired for working on cars outside of the dealership. Jones further testified that in this conversation Tomarchio also said that John Koons did not need the Annapolis dealership, had other businesses, and could "close the doors" and "just lock us out."

Mechanic Ricky Kubert testified that on one occasion in mid-December, he also went to Tomarchio's office to discuss a work problem. Tomarchio asked if there was any way he could talk Kubert out of the Union. Kubert told Tomarchio that he could "give it your best shot." Kubert testified that Tomarchio told him that if the Union came in, the rules and regulations would be much stricter, that it would be difficult for the employees to adhere to union "rules and regulations," that employees could be fired for being late or for a "comeback," i.e. returns by customers for unsatisfactory or incomplete work, and that if Kubert fell down and injured himself, Tomarchio would not be able to pick him up "because of the Union regulations." When Kubert replied that the employees would be the Union, Tomarchio insisted that the Union would bring its own rules and regulations, and that

Kubert would have no say at all. Kubert testified that on another occasion Tomarchio told him that he would be glad to have a union, because the Union would help him make the rules harder, and he could impose more rules and regulations. Mechanic Donald West testified that on one occasion in early December he went to Tomarchio's office to ask for more paid time on a warranty job. Tomarchio told West that if the Union came in, he would not be able to help West. Tomarchio then sternly asserted that if West could not do the job in the allowed time he would get someone else to do it. Having made his point, Tomarchio then put his arm around West, told him that since there was no union he could help him, and gave West the extra time.

Pat Evans testified that before he signed a union card, Tomarchio promised to send him to front-end school while remaining on the payroll. Evans further testified that on three occasions in late November and early December he was summoned to Tomarchio's office to discuss the Union, and that Roy Epling was also summoned to the first interview. Evans testified that at the first interview Tomarchio asked if he knew about the Union and who signed cards, and Evans answered that all the mechanics did. Tomarchio then asked Evans to get the porters and helpers to vote no, because he needed all the help he could get. As Evans left the office he vocally cursed the Union. At the second interview Tomarchio asked if he had gotten anyone to vote no. Evans answered that he did. Tomarchio told him that if the Union came in he could not go to front-end school, because seniority came first and he (Tomarchio) would have no control. Evans testified that in the third interview, Tomarchio asked him what the Union wanted, and he told him. Evans added that he had some porters and helpers who were going to vote no, whereupon Tomarchio expressed his approval. Epling testified concerning an interview with Tomarchio at which Evans was present.

However Epling's testimony was both internally inconsistent and partially inconsistent with that of Evans. Epling testified that Tomarchio told them that only seniority counted, and that if the Union came in they did not have a good chance of moving up. He told them to talk to the other young employees and tell them not to vote for the Union. Epling testified that they agreed, but did not say they were against the Union. Epling initially testified that they did not talk to the employees, but he subsequently testified that he did not know what Evans did.

Tomarchio testified that in a conversation with employees Jones, Buckalew, Howes and Evans, at which Evans spoke against the Union, he told the employees that in a union situation, seniority counts for more than ability. Tomarchio testified that he was referring to opportunity for advancement, and did not mention discharge or layoff. Tomarchio further testified that on their trip back from Jessup, Jones asked whether Koons would close the dealership if the Union came in, whereupon Tomarchio answered with a profane expression to the effect that Koons lacked the courage. Tomarchio also testified that on another occasion Jones told him that he was against the Union, whereupon Tomarchio insisted that he did not care. According to Tomarchio, Jones asked whether they would lose privileges, such as the parts discount and hobby night, whereupon Tomarchio answered that it depended on whatever was negotiated. Tomarchio further testified that with regard to leaving work early, he told Jones that the employees would have to be at the dealership during the hours spelled out in a contract. Tomarchio testified that Kubert repeatedly sought to question him about his opinion of the Union, and he tried to avoid such discussions. According to Tomarchio, he told Kubert and other employees that he didn't care whether the Union came in, and that he could manage in either a union or nonunion situation. Tomarchio testified that

Kubert told him that the employees would not have to punch a time clock when the Union came in, and that he disagreed, asserting that a contract would contain business principles which would be negotiated by Koons. Tomarchio testified that he told West that in a union situation, the contract would provide for skill levels, and that each employee would be expected to perform by himself at his skill level. According to Tomarchio, he told West that he could help, but that if the Union came in he would be administratively tied up, his time would be restricted, and he would not always be available. Tomarchio further testified that Evans voluntarily told him that he would not let him down, and would vote against the Union, whereupon Tomarchio replied that he did not care, that it was up to Evans, and that if he felt so strongly he should go out and spread the word. According to Tomarchio, Evans voluntarily reported back that others would vote against the Union, whereupon Tomarchio replied that he didn't care. Tomarchio further testified that he did not question employees about their union activity or sympathies, or solicit employees to oppose the Union, or threaten employees with reprisals as alleged in the complaint.

I credit the testimony of Jones, Kubert, West and Evans, and I credit the testimony of Epling to the extent that it is consistent with that of Evans. The statements attributed to Tomarchio are consistent with the contemporaneous statements and conduct of make-ready manager Sherbert and with Koons' statements at the Christmas party, and together indicate a Company policy with regard to its opposition to unionization. Moreover Tomarchio repeatedly demonstrated a personal vindictiveness toward the employees in general and the leading union adherents in particular, which tended to color both his version of the conversations in question and the actual situation in the work place. Thus Tomarchio testified that Ricky Kubert was "very opinionated" and

"looking for me to be the scapegoat," that Jones "was always buttering up to me," and that the service department employees were "undisciplined." In fact, the Company had high regard for its line mechanics, and Jones, who was assigned two helpers by Tomarchio, was regarded as one of the best mechanics. This is not to say that I have no credibility problems with any of General Counsel's witnesses. As indicated, I have substantial reservations with respect to the testimony of Epling. However, I find it unlikely that all five witnesses would knowingly testify falsely against the Company, particularly Kubert, Jones and West, all of whom were employed by the Company at the time of their testimony. Kubert in particular generally impressed me as a candid witness who did not hesitate to admit facts which were favorable to the Company, and who held up under cross-examination despite repeated attempts by Company counsel to paraphrase or misconstrue his testimony.[15]

I find that the Company, by Tomarchio, violated Section 8(a)(1) by threatening its employees with plant closure and loss of jobs, more severe discipline including fines and discharge and onerous "rules and regulations," refusal to help employees in their work, loss of schooling or other opportunity for advancement, and loss of the benefits and privileges of discounts on parts, leaving work early, working on their own cars or on other cars outside the dealership, all if the employees selected the Union as their bargaining representative. Tomarchio made no reference to the collective-bargaining process, and did not suggest that the employees might gain anything from this process. Rather Tomarchio simply equated union representation with all of these dire consequences, either as a result of Company action or

[15] In his affidavit, Kubert stated that no one from the Company harassed or threatened or promised him anything personally. However in the same affidavit Kubert described his conversations with Tomarchio. Therefore Kubert's conclusory statement in his affidavit does not tend to impeach his testimony in this proceeding.

through the thinly disguised pretext of fictitious "union rules and regulations." Therefore the threats were unlawful. *May Department Stores, supra*; *H. A. Kuhle Company, supra.*

I further find that the Company, by Tomarchio and Sherbert, violated Section 8(a)(1) by soliciting Evans and Epling to persuade other employees to oppose the Union and to report on the results of such activity, i.e., the attitude of other employees. The Company was particularly determined to use Evans, a self-reliant, intelligent and ambitious individual who might be in a position to influence other young employees. The Company thereby violated Section 8(a)(1) of the Act. *Vincent et Vincent of Allentown Mall, Inc.*, 259 NLRB 1025 (1981). I further find that the Company, by Tomarchio and Sherbert, violated Section 8(a)(1) by interrogating employees concerning their union attitude and activities and those of their fellow employees. The supervisors had no legitimate reason to question the employees, and in only one instance did the supervisor inform the employees that he did not have to answer. In some instances, involving Evans and Epling, the employees were summoned to Tomarchio's office in an atmosphere of unnatural formality. In the circumstances, the interrogation was demonstrably preliminary to an unlawful purpose, namely to determine the strengths and weaknesses of union support in order to counter the union campaign by Company sponsored employee solicitation, threats of reprisal, and (as will be discussed) redress of grievances and grants of benefit. Therefore the interrogation was unlawful. *Vincent et Vincent, supra*, 259 NLRB at 1025-1026; *Sparton Plastics, Inc.*, 269 NLRB No. 98, sl. op at 3-4, JD at 10 (1984).[16]

[16] In its brief (n. 49) General Counsel withdrew the allegation of paragraph 10(b) of the Complaint that Tomarchio unlawfully created the impression of surveillance by informing the employees he knew the mechanics had signed cards. Paragraph 10(a) of the

4. Alleged threats of reprisal by General Manager Hendrick

On Wednesday, January 5, at 4:30 p.m. general manager Hendrick conducted a meeting of the service department personnel in the upstairs conference room. Hendrick also spoke separately to the body shop employees. Mechanics Smith, Kubert, Jones, Felesky and Pierson testified for General Counsel concerning the service department meeting. Acting service manager Collins began the meeting by discussing shop matters and announcing certain awards to the mechanics (the awards will be discussed at a later point in this Decision). Hendrick then spoke concerning the Company's policy with regard to unionization and the election campaign. Smith, Kubert and Jones testified in sum that Hendrick said if the Union got in he would not be able to talk directly to the employees as he had been doing, but would have to go to the Union.[17] Smith, Kubert and Felesky all testified that Hendrick said there would be no discounts on parts if the Union got in. Felesky further testified that Hendrick said the employees would not be able to charge parts, and Smith testified that he said the Company would no longer make personal loans, as it had done for some employees. Felesky and Kubert testified that Hendrick said the employees would lose the privileges of working on their own cars. However Smith testified that he said the employees would probably lose hobby night, and that this was the

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complaint alleges that Tomarchio solicited employees to inform management about who signed union cards. I find that the statement in question (to Evans) was interrogation rather than solicitation. However as discussed, I find that Tomarchio unlawfully solicited Evans to report on the results of his antiunion talk among the employees.

[17] Paragraph 20 of the Complaint alleges that on two occasions in early January, Hendrick made statements to this effect in his office. No evidence was adduced concerning such conversations. I find that if such statements were made at all, they were made at the service department meeting.

only time that Hendrick used the word "probably." The employees testified in sum that Hendrick did not say that these matters would depend on the outcome of contract negotiations. Smith, Kubert and Felesky testified in sum that Hendrick said the Company was actively seeking to replace Jim Collins and Betty Dorr with people who were more qualified to deal with a union. However Pierson, who questioned Hendrick about the matter, gave a more detailed version of Hendrick's remarks. Pierson testified that Hendrick said the Company was seeking a service manager and a body shop manager. Pierson then asked what was wrong with the present managers, whereupon Hendrick replied that if the Union got in the Company would need someone who was more familiar with the workings of a union and how to deal with the situation. Both Collins and Dorr were popular among the employees.

It is undisputed that Hendrick told the employees that the rumors about closing were not true, and that the dealership would not close (In fact, as previously discussed, the alleged "rumors" began with John Koons at the Christmas party). Hendricks testified that he did say the Company might not be able to keep open if it had to pay out more in benefits than it could afford. I also credit the testimony of Hendricks that he said the Company would bargain in good faith. Hendricks also apologized for his accusations at the Christmas party concerning Koons' mobile home. With regard to the allegations of the Complaint, Hendrick testified that he told the employees that they did not need a union, that the Company had an open door policy, and that with a "third party" the employees would not have much to say. Hendrick testified that he did not say the employees would lose discounts or hobby night, but did say that he did not know what would be in a contract. Hendrick further testified that he said he did not know if the Company would be able to continue making loans. Hendrick denied saying that the

Company would terminate Collins and Dorr. According to Hendrick, he said that he was looking for a body shop foreman (not manager), and that he did not know if he could make Collins the permanent service manager, because he did not know the qualifications if the Company lost the election and had to work with a union. (As heretofore found, Crip Brown was promoted to body shop foreman prior to this meeting.) Collins, who was present at the meeting, testified that Hendrick told Pierson that he (Collins) would be considered for service manager, and that Hendrick also said he was looking for a body shop foreman. However Collins did not corroborate Hendrick's testimony with regard to other specific allegations of the Complaint. Dorr was evidently not present at the meeting. The Company produced three present or former employee witnesses concerning the meeting (Robert Sanford, Bruce Bennett and Donald McMullen). They testified in sum that Hendrick said the Company would not close but would bargain in good faith. However they did not corroborate Hendrick's testimony with regard to the specific allegations of the Complaint. The employees testified in sum that they could not remember what else was said.[18]

I credit the testimony of General Counsel's witnesses and I do not, unless otherwise indicated, credit Hendrick's testimony to the extent that it conflicts with their testimony. In light of Smith's testimony, I find that Hendrick spoke in absolute terms about what would happen if the Union came in, except that he said that the employees would probably lose hobby night. Hendrick's statements were consistent with those made by Tomarchio and Sherbert, except that after the confrontation at the Christmas party, the Company tended to take a softer line by backing away from its more extreme threats to close the deal-

[18] In an unsworn statement which he gave to the Company's attorneys, Edward Buckalew said that there were no threats at the meeting. As previously discussed, I find that such conclusory statements have little probative value.

ership or force a strike by not agreeing to any union demands. As discussed, I find it unlikely that the line mechanics would knowingly testify falsely against the Company. Hendrick's testimony with regard to the allegations of the Complaint was substantially uncorroborated except for a matter of Collins and Dorr, and his testimony with regard to Dorr was demonstrably false, because the Company was not looking for a body shop foreman at that time.

I find that the Company, by Hendrick violated Section 8(a)(1) by threatening the employees with loss of access to management if they voted for the Union. *Tipton Electric Company*, 242 NLRB 202, 205-206 (1979), enf'd. 621 F. 2d 890 (8th Cir., 1980); *Community Cash Stores, Inc.*, 238 NLRB 264, 268 (1978). I further find that Hendrick violated Section 8(a)(1) by threatening the employees with loss of the benefits and privileges of discounts and charging parts, hobby night, and obtaining personal loans from the Company. Hendrick did not speak in terms of the give-and-take of collective bargaining. Rather, without giving any objective reasons, he told the employees that they would or probably would lose these benefits and privileges if the Union came in. By making these threats, Hendrick effectively nullified his assertion that the Company would bargain in good faith. However, I find that Hendrick did not violate Section 8(a)(1) by telling the employees that the Company was actively seeking to replace Collins and Dorr. As these managers were supervisors under the Act, the Company could lawfully terminate them for union-related reasons, and the Company did not act unlawfully by informing the employees of its intentions in this regard. See, *Algonquin Bowling Center, Inc.*, 170 NLRB 1768, 1770 (1968).

Patrick Evans testified that he made an appointment to meet with Hendrick on January 10, in order to hear his side before the election. Evans testified that Hendrick said he couldn't say much, but that all he could guarantee from the Union was dues, and that if the Union came in

there probably would never be another Christmas party unless the Union paid for it. Evans testified that he told other employees about this conversation. Hendrick testified that Evans questioned him about the Union, asked what changes would take place if the Union came in, and specifically, whether there would still be a Christmas party. Hendrick testified he answered that whether the employees gained or lost depended on the outcome of negotiations, and with regard to the Christmas party, that "economically, things can change" with or without the Union, and that he didn't know the answer. I credit Evans. If Evans wished to question Hendrick about specific matters, then it is unlikely that he would have chosen the annual Christmas party as a subject for discussion. Rather it is more likely, as testified by Evans, that Hendrick injected the matter into their conversation. Moreover the Company continued to have a Christmas party even in 1980 and 1981, when it was ostensibly operating at a substantial loss. Therefore Hendrick's alleged explanation to Evans does not ring true, because it is evident that absent a discriminatory motive, the Company had no intention of discontinuing the annual Christmas party even under the worst of circumstances. I find that the Company, by Hendrick violated Section 8(a)(1) by threatening its employees with loss of the annual Christmas party if the employees selected the Union as their representative.

5. Alleged Threats by John Koons on January 10.

On Monday, January 10 John Koons addressed a meeting of the service and parts department employees. Koons testified in sum that he made clear his opposition to unionization, but apologized for the lack of communication under Tomarchio, asserted that he would not close the dealership, and further asserted that he would bargain in good faith if the Union came in. Koons' testi-

mony was corroborated by present and former employee witnesses for both sides, including Karl Jones and Ricky Kubert. However former line mechanic Thomas Dixon testified that Koons said there had been "a lot of fun in the shop prior to the union activities," but that if the Union came in he would not be able to lend money or let anyone charge parts, and would not help the employees. Dixon further testified that Koons said he would not close the dealership unless the Union forced him to do so by asking too much. Koons, in his testimony, denied making the alleged threats, or even discussing the matter of credit and loans. Koons testified that Hendrick formulated Company policy with regard to these matters, and that he was not fully familiar with that policy. Dixon's version of Koon's speech was uncorroborated by any other witness. He tended to be hesitant and uncertain about just what Koons said. It is quite possible that Dixon was confused as between Hendrick's speech and Koons' speech. I credit Koons, and I find that Koons did not make any unlawful threats in his January 10 speech.

B. *Alleged unlawful pay increases, bonuses, and other changes in employee compensation*

The Complaint alleges that the Company violated Section 8(a)(1) and (3) of the Act by granting certain pay increases, bonuses and other changes in compensation to unit employees during the election campaign.[19] All of

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[19] The Complaint alleges that the Company made these changes because the named employees "joined, supported or assisted the Union" and engaged in other protected concerted activities, "and in order to discourage employees from engaging in such activities." However in light of the specific alleged unlawful changes and the evidence presented in support of the complaint, I do not understand the thrust of General Counsel's case to be that the Company granted increases and benefits only to employees who joined the Union. Rather the thrust of its case appears to be based on the second conclusory assertion, namely, that the Company made these changes in order to discourage employee support for the Union.

these changes are alleged to have occurred on or about January 6, i.e., within a week of the election, except for bonuses to make-ready employees which were announced at the Christmas party on December 18. I shall first discuss one of the changes which occurred in January, because, as will be discussed, the circumstances of that change are evidentiary with respect to the other allegations of the Complaint and the Company's answer to those allegations.

1. Change in formula for computation of body shop employees' wages.

During the election campaign there were 6 metal employees and three painters in the body shop. Prior to April, 1982 they were paid weekly on the basis of 50-percent of the labor charge for the jobs on which they worked. (The labor cost is determined by the Crashbook Guide. For warranty work the employees were paid under the flat rate hour system.) The metal employees, but not the painters, purchased their own materials, i.e., tape, putty, fiberglass, sandpaper, grinding discs and similar items. In April 1982 the Company changed the compensation formula. Painters received 45-percent of labor charges up to $1200, and 50-percent above that amount. Metal employees were paid on a sliding scale of 40-percent of labor charges up to $800, 42.5 percent of the amount from $800 to $960, and 45-percent of the gross labor charges above $960. However, the Company supplied all materials at no cost to the employees. There is no contention by the Company that this change took place as the result of any periodic evaluation. General Manager Hendrick specifically admitted that neither the April, 1982 change nor the January, 1983 change which is the subject of the Complaint, were made as the result of any semi-annual evaluation (Moreover, as will be discussed, the Company contends that such reviews were made in June and December and implemented in July and January of each year. Therefore the April, 1982 change

would not fit into this pattern). It is evident, at least with respect to the painters, that the April, 1982 change was a reduction in their rate of pay. The Company's witnesses gave conflicting reasons for this change. Hendrick testified that John Koons told him that most shops paid only 45-percent, and that the Company was having problems which were caused by the use of inferior materials. However body shop manager Dorr testified that there were no such problems. Dorr testified that she was told that work was slow and the change was expected to make the employees more productive, but she professed to be unable to explain how the change would achieve this result. John Koons testified that he reduced the rate of pay at JKJ Chevrolet, and instructed Hendrick to do the same at Annapolis, in order to produce more income for the Company through centralized purchasing of supplies. The explanation makes no sense because the metal employees had been purchasing supplies at no cost to the Company, and the Company had always furnished supplies for the painters. Koons was correct in part, namely that the change was intended "to make more profit for ourselves." In sum, the Company sought to make more profit by reducing the rate of pay of its body shop employees, and by placing them in a position where they had to produce more in order to move into a higher income rate.

The change was extremely unpopular with the employees, who from the beginning constantly complained to Dorr; who in turn informed Hendrick of these complaints, but to no avail. Dorr testified that the employees told her the change would cost them $2000 to $3000 per year. In September service manager Tomarchio attempted on his own to institute a different compensation system, but his action was promptly countermanded by Hendrick. About this time one of the body shop employees quit his job because of dissatisfaction with the compensation system. According to Hendrick, Dorr asked him to permit Tomarchio to continue the revised system. However Dorr

testified that Tomarchio's system was "different and confusing" and that she repeatedly asked Hendrick to restore the former system. According to Hendrick and Dorr, Hendrick told her that he would reevaluate the compensation system in January. In fact, Hendrick had no authority to make such a promise, because the April, 1982 change had been personally ordered by John Koons. In his testimony, Koons was vague and evasive about when he decided to restore the 50-percent compensation rate. According to Koons, the matter was under discussion since September, and he was "leaning that way" in November or December, but the actual decision was not made until December or January, and that he and Hendrick agreed upon the change in early January. The company presented several body shop employees who testified concerning the compensation system. However only one witness testified that there was any promise to review the system, and that witness ended up by corroborating General Counsel's position. Metal employee Archie Brown testified that in September or October, Betty Dorr told him that they would let the existing system remain in effect until January to see if it would work. However Brown then testified that Dorr said they would "let it stand for a year to see if it worked." If Dorr meant one year from April, 1982, then the existing system would remain in effect until April, 1983. If Dorr meant one year from their conversation, then it is evident that the existing system would remain in effect until at least September 1983. Either way, it is evident from Brown's testimony that as of September, 1982 the Company had no intention of changing or even reconsidering the existing system in or about January.

It is undisputed that effective as of January 6, the Company restored the former 50-percent compensation rate for the body shop employees. Hendrick and Dorr testified in sum that in early January, Dorr met with the body shop employees and offered them a choice of either

continuing the existing compensation system or returning to the 50-percent compensation rate, provided that the metal employees purchased quality materials. The employees voted unanimously to return to the former system. Dorr informed Hendrick of their choice. Hendrick told her that the change would be implemented in the next pay period, and Dorr promptly so informed the employees. No evidence was introduced that the Company ever evaluated the compensation system as allegedly promised by Hendrick. As indicated, the Company let the employees make their choice. Indeed, the Company has virtually conceded in this proceeding that it restored the former system as a means of redressing its employees' grievances. In its Answer, the Company conceded that it restored the former compensation rate as the result of "an ongoing effort and dialogue between Respondent and its effected employees concerning the most desirable and effective system to be used in meeting the needs of both respondent and its employees." In fact, prior to December, 1982 the Company turned a deaf ear to its employees' complaints. Betty Dorr admitted that she knew that the Union was using the compensation problem as an issue in the campaign, and that in December she told John Koons that the biggest problem in her shop was that the employees wanted the old compensation formula. It is also undisputed that after the Company restored the former formula, it made no effort to monitor the purchase of materials by the metal employees and never told them what materials they should use. Indeed, several Company witnesses testified to that effect.

I find that but for the Union's successful organizational campaign and its petition for a Board election, the Company would not have restored the former compensation system. I further find that the Company restored the former system in order to discourage employee support for the Union in the pending election. Therefore the Company violated Section 8(a)(1) and (3) of the Act. See

generally, *N.L.R.B.* v. *Exchange Parts Co.*, 375 U.S. 405, 409-10 (1964); *N.L.R.B.* v. *Styletek, Division of Pandel-Bradford, Inc*, 520 F. 2d 275, 279-282 (1st Cir., 1975). Specifically, it is unlawful for an employer to grant redress of employee grievances during an election campaign in order to discourage support for a union, regardless of whether the employer's action actually result in monetary benefit to the employees. See, *Uarco, Incorporated*, 216 NLRB 1 (1974). Therefore in determining whether the employer acted unlawfully, it is immaterial whether the change actually resulted in financial benefit to the employees. In fact, the change did result in a higher rate of compensation. Indeed, the employees' own complaints speak for themselves. It is unlikely that employees would persistently and urgently demand a return to a system which paid them less or the same as they were currently earning. With respect to the painters, it is obvious that they received a higher rate of pay under the pre-April 1982 system, since they never paid for their own supplies. Fifty percent of $1200 is more than 45-percent of $1200 ($60 per week more, to be exact). In support of its contention that the employees did not make more income as a result of the January change, the Company presented a comparison of the employees' gross wages under the formula in effect from April, 1982 to January, 1983, with that under the restored former formula since January, 1983. The Company's argument begs the question. The employees' gross income depends first and foremost on their volume of work, i.e., gross labor sales, which in turn depends primarily on factors other than their rate of compensation. A more accurate measure of the change may be made by comparing the employees' earnings under the April, 1982 formula with that under the formula restored in January, for weeks in which they had comparable gross labor sales figures on their respective jobs. For example, during the week ending December 1, 1982, painter Jim Fenderson earned $301.14 on gross labor sales of $669.20. During the week

ending April 6, 1983, under the restored 50-percent formula, Fenderson earned $331.00 on gross labor sales of $662.00. During the week ending April 14, 1982, metal employee Kenneth Boston earned $271.44 on gross labor sales of $678.60, which is a low volume of business for metal employees. During another slow week in 1983 (week ending April 20, 1983) Boston earned $308.80 on gross labor sales of $617.60, i.e. a difference in earnings of about $37. The difference in earnings was substantially greater during comparatively busy weeks. During the week ending June 30, 1982, metal employee Sedgewick Cole earned $569.51 on gross labor sales of $1269.79. During the week ending January 12, 1983 Cole earned $631.41 on gross labor sales of $1262.81, i.e., a difference of about $62. Under the last week of the sliding scale formula, metal employee Jack Winemiller earned $667.17 on gross labor sales of $1482.60. The next week, under the restored 50-percent formula, Winemiller earned $731.80 on gross labor sales of $1463.60, i.e., a difference of over $64.

Nevertheless, the Company contends that the metal employees did not actually make any financial gain because they now had to pay for their own supplies. In support of this contention, the Company presented witnesses who testified in sum that the metal employees spent from $30 to $40 per week on supplies. No records were presented in support of this contention. However the comparative figures discussed above, indicate that even assuming these estimates to be correct the metal employees were nevertheless in a position to make more money under the 50-percent formula. Moreover, the employees could deduct such expenses on their Federal and State income tax returns. For this and other reasons indicated by the evidence, I am inclined to view these estimates of expense figures with some skepticism. Thus Jack Winemuller testified that he spent about $30 per week on supplies, depending on the work done. Sedgewick

Cole testified that he spent $30 to $40 per week on supplies, depending on the work done. However the Company's labor sales figures indicate that Winemiller was the body shop's biggest producer during the first 7 months of 1983. Winemiller worked on jobs with gross labor sales totalling $31,382.65, compared with $19,779.11 for Cole during the same period. These figures, coupled with the employees' obvious self-interest and their own strong preference for a system under which they purchased their own supplies, tends to indicate that Cole, at least, was exaggerating.

In sum, I find that the Company violated Section 8(a)(1) and (3) of the Act by redressing employee grievances and by granting a higher rate of pay to the body shop employees in order to discourage employee support for the Union. The Company waited until shortly before the election in order to maximize the impact of its action. It is unlikely that the Company would have embarked on such a course of action without also attempting to similarly appease other important segments of the election unit. Therefore I find that the evidence with respect to the wage formula change, including the Company's admissions with respect to the reasons for that change, is also evidential with respect to other increases and bonuses granted during the election campaign, and tends to impeach the Company's asserted reasons for such increases.

2. Bonuses to make-ready workers, and the technician of the year and technician of the month awards.

At the December 18 Christmas party, general manager Hendrick announced that the Company was awarding $50 bonuses to 8 named employees for their "fine work" in preparing a large number of cars for delivery to the State of Maryland (Hendrick inadvertently failed to name a ninth employee, Edward Buckalew, who was

given his check the next workday). General Counsel contends that the awards were unlawful. In support of its position that the awards were not unlawfully motivated, the Company presented evidence concerning a "technician of the year" and "technician of the month" awards in order to show that the granting of bonuses was not unusual. For the reasons which will be discussed, I find that the bonuses to the make-ready workers was not discriminatorily motivated, but that the Company distributed technician of the year and retroactive technician of the month money among its line mechanics in order to discourage support for the Union, and thereby violated Section 8(a)(1) and (3) of the Act.

The $50 bonuses were awarded to make-ready employees and some regularly classified porters and helpers who were specially assigned to prepare a fleet of cars for delivery to the State of Maryland. The contract in question called for the delivery of some 351 cars over a period of about 8 months. However a substantial number of the cars were delivered in early December. Hendrick testified that some 172 cars were delivered during a short period of time in December. Preparation was made difficult by rainy weather. Some of the work was performed during overtime hours. Most of the work was performed by the Company's young, unskilled and relatively low paid employees. In these circumstances, it would not be surprising that the Company, in a burst of Christmas good will, might choose to reward the make-ready workers in some way. I recognize that this is a close question. The bonuses were announced and granted during the election campaign. However as indicated, the bonuses were awarded in the context of another unusual situation. The Company regarded its make-ready and other unskilled personnel as a group which was particularly vulnerable to employer pressure, and therefore (as found) tended to direct much of its unlawful conduct at them. The Company may have been inclined to give

them a double dose of rewards. (As will be discussed, the Company gave merit pay increases to the make-ready employees in early January). It is also possible that the Company saw an opportunity to grant increases to the helpers and newly-hired porters (temporarily assigned to make ready) who would not be amenable to "merit" increases. However it is unlikely that the Company would grant wage increases and other benefits to some of its employees in order to discourage support for the Union, while totally neglecting the line mechanics, who were the largest, most important and most influential group among the unit employees. Indeed, this is a principal weakness in General Counsel's theory of the case. Additionally, the evidence indicates that until the confrontation at the Christmas party, the Company tended to take a hard line, whereas in January the Company took a softer approach, modifying its threatening language while holding out an olive branch in the form of wage increases which were timed in order to achieve the maximum effectiveness.

The technician of the month award was initiated by service manager Tomarchio in April, 1982. Tomarchio set up a rating system whereby the service writers and assistant manager Collins (and Tomarchio in the event of a tie vote) selected the outstanding mechanic of the month. That mechanic was given a $200 award, which was announced at the monthly service department meetings. Second and third awards ($20 and $10 respectively) were also given. From the beginning the mechanics found the system distasteful. Evidently they regarded the awards as divisive and smacking of favoritism. Therefore, the recipients would share their awards with the other mechanics. In September Tomarchio asked the mechanics to select the recipient. The mechanics demonstrated their contempt for the system by selecting the mechanic with the worst record of comebacks. Tomarchio told them to vote again. The result was that no

award was given in September. Tomarchio in his testimony described the technician of the month system, but made no reference to any technician of the year award. No mechanic testified that they were promised a technician of the year award. Nevertheless General Manager Hendrick testified that at a meeting in early January, he told the mechanics that Tomarchio made a commitment for a technician of the year award, that the mechanics told him that they didn't care, but that he insisted he would "settle my obligation," whereupon the mechanics said they would split up the money. The Company then distributed $700 in cash which was divided up among the mechanics ($53.85 per mechanic). At the same time the Company distributed monthly award money not only for December, but also for September, notwithstanding that Tomarchio had declined to give an award for that month.

I find that the Company's distribution of a large sum of cash to its mechanics in early January, at the same time that it increased the rate of compensation to its body shop employees and granted merit increases to most of its hourly paid employees, was part and parcel of the same course of conduct which was designed to discourage employee support for the Union. Hendrick knew that because of the unique wage structure of the mechanics, which was based on their qualifications and rates as set forth in the applicable manual, he could not grant them wage increases in a conventional manner. Hendrick also knew that the mechanics had no interest in any "technician" award, and viewed such awards with contempt. Therefore he seized upon a fictitious "technician of the year" award, knowing that the mechanics would simply divide the money among themselves. Hendrick thereby found a means of appeasing the mechanics, who were the spearhead of the Union movement, by giving them what amounted to a substantial bonus shortly before the election. Hendrick even added to the pot by reviving the September award, which had been rejected by Tomarchio.

I find that the Company violated Section 8(a)(1) and (3) of the Act by granting bonuses to its mechanics in the guise of a "technician of the year" award, in order to discourage support for the Union. The Company raised the matter of the January distribution by way of defense to the complaint, and was permitted to and did present evidence concerning the "technician of the month" and "technician of the year" awards. Witnesses were questioned by Respondent, General Counsel and the Administrative Law Judge concerning the matter. The January distribution is closely related to allegations of the complaint concerning wage increases and other compensation changes at the time. I find that the matter was fully and fairly litigated, and that it is appropriate for me to make findings thereon. *Quaker Mfg. Corp.*, 224 NLRB 1059, 1061, n. 3 (1976), enf'd. 574 F. 2d 358 (6th Cir., 1978). I believe that I am obligated to make appropriate findings on conduct asserted by way of defense by a respondent, which conduct appears to be unlawful, regardless of whether General Counsel has taken a position on the matter. *M & J Trucking Co., Inc.*, 214 NLRB 592, 597 (1974), enf'd. 93 LRRM 2336 (9th Cir., 1976). An Administrative Law Judge, like the Board, is not confined to consider only theories advanced by the parties, but must make an independent evaluation of the evidence.[20]

3. January pay increases to make-ready and parts department employees and used car mechanics.

Effective as of January 6, the Company gave hourly pay increases to 7 of its 8 make-ready employees (25-cents increases to McMullen, Lewis, Sanford, Bennett,

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[20] At the hearing counsel for General Counsel asserted that he was not previously aware of the "mechanic of the year" award. In its brief, General Counsel takes the position (Br. 83) that the technician of the month awards as administered by Tomarchio, were lawful. Obviously they were, as the program was initiated long before the union campaign. However General Counsel did not take any position with respect to the January distribution.

and Snodgrass, a 30-cent increase to Vester, and a 50-cent increase to used car make-ready employee Marshall). Sharon Albert, the remaining make-ready employee, worked in the Porsche-Audi Division and was paid per unit cleaned. Effective January 6 the company also gave hourly pay increases to 6 of its 11 parts department employees (25-cents increases to Brock, Conway and Mitchell, a 35-cents increase to Lawrence, and a 40-cents increase to James Sherbert. Among the remaining parts department employees, Arismendi was hired on December 1 and worked part time, McCabe began working as a parts driver on November 2, and Cully was promoted to counterman on October 28, when he received an hourly wage increase plus commission. Also effective January 6, the Company gave increases of $25 per week to 2 of its 3 used car mechanics (Strittmatter and Russell). The third mechanic, Owen, was absent because of illness during much of late 1982 and early 1983. Inventory clerk Mary Sherbert also received an hourly raise effective January 6, but her increase is not alleged as discriminatorily motivated.

General manager Hendrick testified in sum that the January raises were granted pursuant to a semi-annual review policy which he established in the summer of 1981, shortly after becoming manager. According to Hendrick, employees (except line mechanics) met with and were reviewed by their supervisors in June and December of each year. The results of such review, including pay increases if warranted, would be implemented the following month (July and January respectively). Hendrick testified that he wanted but did not require written evaluations, and that consequently some but not all evaluations were written. Hendrick testified that he promised "several of the girls upstairs," i.e., the office clericals, that there would be a semi-annual review, but that other employees were informed of this policy either by their supervisors or through a "service depart-

ment training policy" booklet which was prepared by himself and service manager Tomarchio during 1982 and issued in September or October of that year. Tomarchio testified that he gave copies of the manual to line mechanics Pierson, Smith and Kubert in October, 1982. The manual provided in pertinent part that: "The Service manager must evaluate at least semi-annually all non-personnel under his authority." Hendrick and Tomarchio, in their testimony defined "non-productive personnel" as those who did not generate income for the Company, i.e. those employees who were paid on the basis of an hourly wage or fixed salary. Hendrick and John Koons further testified in sum, that this semi-annual review policy was consistent with a similar policy utilized at the other Koons dealerships.

The evidence indicates that if the Company did in fact follow a semi-annual review policy, it was honored more in the breach than the observance. The Company presented in evidence documents which Hendrick identified as comprising all of the written employee evaluations since he became manager. Most of the evaluations were signed by Tomarchio's predecessor, Bob Dose. Only one was signed by Tomarchio. The remainder were signed by managers who were principally responsible for sales and clerical personnel, e.g. John Taber and Mario Debini. There were no written evaluations by Hendrick, Jim Collins or managers Sherbert, Dorr, Gavin or Christmas. Archie Brown, a long-time body shop employee who was presented as a Company witness, testified that Rose evaluated him in 1981, but that he did not go through any evaluation process thereafter, until June 1983, and specifically, that Betty Dorr did not evaluate him in December 1982. Jim Collins testified that he was aware of an evaluation procedure because when he worked as a dispatcher, Rose would evaluate him at the beginning and middle of the year. However Collins admitted that Tomarchio (his immediate supervisor) never evaluated

him, and that he (Collins) never evaluated any employees, even in December, 1982 when he was acting service manager. According to Collins, he did not evaluate employees because he lacked the experience, although Collins was obviously at least as well qualified, and probably more so than Irv Sherbert in this regard. Make-ready employee Sanford and former make-ready employee Bennett, who were presented as Company witnesses, testified in sum that Sherbert individually evaluated them every six months. Sanford further testified that on each occasion Sherbert filled out a form, which Sanford signed. Their testimony was contradicted by other Company witnesses, including Sherbert himself. Sherbert testified that he never filled out an evaluation form, that Hendrick never told him to do so, and in sum that the only "evaluation" process which he used in December or January, consisted of calling the make-ready employees together, telling them they were doing a fine job but shoud improve their appearance, and then recommending to Hendrick that they receive raises. Sherbert testified that this occurred on the morning of January 4, immediately upon his return from vacation, that Hendrick immediately told him to give the raises, and that he informed the employees that afternoon that they would be receiving raises effective Thursday, January 6. Donald McMullen and Charles Vester each testified in sum that Sherbert did not go through any evaluation process until July, 1983. Significantly, General Manager Hendrick testified that he drafted a list of proposed raises some time between Christmas and New Year's (including the raises which were subsequently given to the make-ready crew), had the list typed on December 30 or 31, and presented the list to John Koons for his approval on January 4. If so, then it is evident from Sherbert's testimony that Hendrick intended to give raises to the make-ready crew regardless of any evaluation process (Hendrick testified that Sherbert made his recommendations before leaving for vacation on Decem-

ber 24. However as indicated, Sherbert testified otherwise). Parts manager Gavin Similarly testified that he did not make either oral or written performance reviews, and did not tell employees under his supervision that there would be a six month review.[21] Gavin testified that in January he recommended Lawrence, Brock and Howell for raises, but did not recommend raises for any other employees in his department. Hendrick's draft of proposed raises, discussed above, indicates that Hendrick initially intended to give raises to parts employees Conway, Mitchell and Sherbert but subsequently added Lawrence, Brock and Howell. Hendrick testified that the 3 were added because Gavin was late in getting in his recommendations. However in light of Gavin's testimony, it is evident that Hendrick was determined to give raises even when not recommended by Gavin.[22]

The evidence discussed above indicates that former service manager Rose made use of a review procedure, but that after Rose left the practice fell into disuse. The practice was revived only after commencement of the present litigation, in an effort to retroactively justify the large scale and unprecedented raises and other pay increases which were granted shortly before the election. The service department manual relied upon by the Company, together with the Company's own records, further indicates that even to the extent that the Company effectuated a policy of granting pay raises at periodic in-

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[21] Parts counterman Jack Lawrence, who worked in the department for 5 years, testified as a General Counsel witness that prior to January, 1983 he was never told of any review policy. The Company did not present any parts department employees as witnesses.

[22] Hendrick testified that he and Gavin agreed that parts clerk Stock was a poor performer who was already overpaid. The circumstances of 3 of the other 5 department employees who failed to receive raises, have previously been noted. The fifth employee, parts counterman Marski, was by far the highest paid employee in the department.

tervals, that policy was designed primarily for a relatively small group of employees. There are only a few "non-productive personnel" in the service department. Below the managerial level they consist of clerical employees, porters, a janitor and mechanic's helpers. The make-ready and used car employees fall under the sales department. The parts employees are also in a separate department. The evidence further indicates that the periodic raise policy was used primarily for the benefit of the clerical employees. As discussed, Hendrick admitted that he told only the clerical employees about the alleged review policy. In early July, 1981, when Hendrick was acting as general manager and Rose was service manager, the Company gave raises to 10 employees, all of whom were clericals. The Company gave no merit increases in January, 1982. According to Hendrick and Koons, the Company did not then give raises because of its poor financial condition. However the Company was also in poor financial condition in July, 1981, shortly after Hendrick took over, when the Company gave raises to its clerical (non-productive) employees, notwithstanding Hendrick's pledge to put the dealership in order and "put a clamp on all expenses." As this was the first and only winter of Hendrick's administration prior to the Union's organizational campaign the evidence plainly falls short of demonstrating a consistent pattern of granting merit increases in January of each year, much less a committment of the employees to grant such increases. In early July, 1982 the Company granted pay increases to 14 employees, 7 of whom were clericals.[23] The evidence further indicates that the Company did *not* have a policy against granting wage increases or making other substantial changes in employee compensation at times of the year other than January or July, if in its opinion such changes were

[23] Make-ready employee Vester testified that he received a raise in July, 1982. In fact, he did not.

warranted. As discussed, in April, 1982 the Company substantially changed the rate of compensation for its body shop personnel. Also in the spring of 1982, shortly after Gavin became parts manager, he made a thorough review of the compensation structure in his department, pursuant to Hendrick's instructions. As a result, the Company changed the rate of compensation for several department employees. (The employees were paid under a complex system, varying from one employee to another, whereby countermen and sometimes clerks were paid an hourly wage plus percentage of gross sales above a certain amount, while the drivers and some clerks received an hourly wage.) Significantly, the Company did not wait until July to implement these changes. It is evident that by reason of these changes, Gavin felt that the January, 1983 raises were not warranted from an economic standpoint, but was pressured by Hendrick into recommending the raises. The case of warranty clerk Bonnie Bailey, relied upon by the Company as evidence of its alleged semi-annual review policy, is particularly illustrative. Bailey's personnel file contained an employee status change report, effective November 1 and signed by Tomarchio, which indicated that Bailey would receive a commission of 1% on warranty labor charges. The change was marked as denied by Hendrick because "not semi-annual review," and Hendrick testified that this was his reason for disapproving the change. Hendrick testified that he made the entry about December 1. As the Union had by then filed its election petition, and December was ostensibly the time for performance reviews, the veracity of Hendrick's entry is at best questionable. In fact, Hendrick simply overruled Tomarchio's promise to Bailey on its merits. Instead, on November 1 (according to the Company's records) the Company paid Bailey $150 "to correct misunderstanding" and effective as of December 13 (according to Company records), the Company gave her a $1.00 per hour salary increase (The date of November 1 is scratched out on her per-

sonnel folder). If as indicated by the Company's records, the Company changed Bailey's compensation on November 1 and possibly again on December 13 at the latest, then there was no reason why the Company could not have done likewise for its body shop, parts department and make-ready employees if it were so inclined. Instead, the Company waited until shortly before the election, and then granted increases to most of these employees with little evident regard to consideration of merit.

In support of its economic defense, the Company also adduced testimony by John Koons to the effect that he followed a semi-annual review and merit raise policy at other dealerships. However this evidence simply tended to confirm what Koons admitted in his testimony, namely that he gave Hendrick substantial discretion in running the Company, and that consequently Hendrick normally set pay rates at Annapolis, subject to final approval by Koons. Thus in January, 1982 JKJ Chevrolet granted raises, but the Company and Koons Chrysler-Plymouth did not. In July, 1980 the Company and JKJ Chevrolet granted raises, but Koons Chrysler-Plymouth did not. Therefore it is evident that Hendrick was not obligated to follow pay practices at other Koons dealerships unless specifically so instructed by Koons. Indeed Hendrick made clear in his testimony that it was his decision to utilize the alleged semi-annual review policy, and that he was not ordered to do so by Koons.

Also in support of the Company's economic defense, the Company produced internal memorandum which purported to demonstrate that the Company regularly followed a semi-annual review policy, and continued to effectuate that policy in December, 1982. The Company presented minutes of a managers' meeting on June 30, 1981 which listed among things to do: "Schedule girls individually for a salary review as promised today." The Company also presented a memo dated June 17,

1982 from Hendrick to four managers, telling them to prepare their recommendations for salary increases or decreases by June 22. Hendrick did not send copies of the memo to Gavin, Dorr or Christmas. These documents, if they prove anything, simply confirm that the ostensible semi-annual review policy had limited application. The Company also produced 2 memoranda ostensibly prepared in December, 1982. The first, an agenda for a managers' meeting on December 1, indicated that the managers were instructed to review all employees and make recommendations regarding raises. The second, a similar agenda for a December 8 meeting, listed as an agenda item "Review of semi-annual employee evaluations." However General Counsel presented in evidence a third agenda, for a December 22 meeting, indicating review at that meeting of "annual" employee evaluations. As found, no writen evaluations were prepared in December or even January, and recommendations to the extent made were submitted to Hendrick in January. It is evident that these memoranda, which were prepared after the Union filed its election petition, were simply intended to falsely create the impression that the Company was carrying out a pre-ordained review policy.

The employee complement in the used car department consisted of mechanics Owen, Russell and Strittmatter and make-ready employee Marshall. Marshall had previously received a 50-cents per hour merit increase in May, 1982. Russell and Strittmatter were line mechanics who were transferred into the used car department in September, 1982 on a temporary basis because of Owen's illness. They were placed on a hourly wage ($6.25, or $250 per week). Marshall, who was presented as a Company witness, testified that in late December general sales manager Taber told him that he would probably get a raise if he could put in more time. Marshall was suffering and continued to suffer from asthma, and his attendance

never improved. Nevertheless, without waiting to see if his attendance improved, the Company through used car manager Christmas informed Marshall on January 4 or 5 that he was receiving a raise, adding the admonition that he should put in more time. Marshall received a 50-cents per hour increase, one of the largest increases given by the Company at that time. Mechanic Russell, who was presented as a General Counsel witness, testified that on the morning of the election Christmas told him that he would like to give him a raise but could not "because of the union stuff that was going on." Russell complained that he heard that the make-ready employees had received raises. Russell testified that that afternoon, Christmas told him that the Company's attorney advised that they would give scheduled raises, and that Russell would get a $25 per week raise. Russell, Strittmatter and Marshall all received raises effective as of January 6. Christmas, in his testimony, denied that he discussed the raise with Russell on election day. Christmas testified that in December he recommended to Hendrick that the 3 employees receive raises because he felt they deserved them, but that Hendrick was unsure of what to do because of the pending election. Christmas further testified that on January 5 he again asked Hendrick about the raises, and that Hendrick, after apparently making a telephone call, told Christmas to "give them the raises and do the performance reviews." Christmas immediately informed the employees that they were receiving raises. Marshall in his testimony inferentially corroborated Christmas' testimony in one respect. Marshall testified that on the day he learned of his raise, Russell indicated to him that he also received a raise. However Christmas' testimony was inconsistent with the Company's Answer to the complaint and with the testimony of Hendrick and Marshall in other respects. The Company's Answer stated that the raises to Strittmatter and Russell "were contemplated at the time of reassignment as necessary in these 'special cases' to ease the

financial impact of their classification change." If so, then there was no reason why they could not have received the raises long before January, since according to Hendrick and Koons, a change in job duties does not come under the alleged semi-annual review policy, and therefore compensatory raises may be and were in fact granted at any time. Moreover, as discussed Hendrick allegedly made his decision to give the raises in December, subject only to Koons' final approval, which was given on January 4 when Koons visited the dealership. If the Company needed legal advice before granting raises, then it is unlikely that it would have waited until January 4 or 5 to obtain such advice. Additionally, as discussed, manager Taber, who was Christmas' superior, informed Marshall in late December that he would probably not receive a raise until he improved his attendance. I do not credit Russell's testimony concerning his alleged conversation with Christmas on election day. I find that all of the employees received their raises at the same time. However I find that but for the pending election, they would not have received those raises.

In sum, the Company on January 6 granted pay increases to 16 unit employees, increased the rate of pay of 9 other unit employees, and granted bonuses to 13 line mechanics. These changes effectively and immediately increased the compensation of 38 of 66 unit employees.[24] There is direct evidence, including Company admissions,

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[24] The circumstances of some of the unit employees who did not receive raises has previously been discussed. Among the remaining employees, the porters and two clerical employees were recently hired, the helpers were paid by arrangement with their respective mechanics, and the janitor was a part time, semi-retired employee. The remaining unit employees (service dispatcher, service writers and Porsche-Audi mechanics, were paid by salary plus commission or flat rate arrangements which placed them among the Company's highest paid employees. In these circumstances, the fact that these employees did not receive increases in January, 1983 is not significant.

that the rate increase granted to the body shop employees was a last-minute effort by the Company to redress longstanding employee grievances in order to discourage support for the Union. The evidence adduced in this proceeding further demonstrates that the Company did not have a systematic, general semi-annual review policy, that the Company's actions in January were unusual and unprecedented, that many employees probably would not have received increases but for the Union's organizational campaign and that even to the extent that some employees might have received raises, the timing of these increases was carefully calculated to achieve the maximum propaganda value in the election campaign. I find that in January, the Company granted pay increases, increases in wage rates and bonuses to its employees in order to discourage support for the Union, and thereby violated Section 8(a)(1) and (3) of the Act.

c. *The Election, the propriety of a conventional cease and desist order, and the propriety of a bargaining order.*

The Union's objections to the conduct of the election, which are encompassed by certain allegations of the complaint, are meritorious to the extent that I have found that the Company engaged in unfair labor practice conduct during the critical period between the filing of the election petition on November 24 and the Board-conducted election on January 12. Therefore I am recommending that Union Objections Nos. 1, 2, 3 and 4 (covering pay increases in January), and Nos. 9, 11, 12, 13, and 15 (threats of reprisal) be sustained. For the reasons previously discussed, I am recommending that Ojections Nos. 6 (bonuses to make-ready workers), and 10 (threat to fire well liked supervisors) be overruled. I further find that the Company unlawfully interfered with the conduct of the election by conduct alleged in the complaint and

found unlawful but not specifically alleged in the objections (threats, interrogation and solicitation), and conduct found unlawful but not alleged in either the complaint or the objections (bonuses to line mechanics). See, *American Safety Equipment Corporation*, 234 NLRB 501 (1978), rev'd. on other grounds, 643 F. 2d 693 (10th Cir. 1981). In *Super Thrift Markets, Inc. d/b/a/ Enola Super Thrift*, 233 NLRB 409 (1977), the Board held:

> . . . Our normal policy is to direct a new election whenever an unfair labor practice occurs during the critical period since "[c]onduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election." *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782, 1786-1787 (1962). The only recognized exception to this policy is where the violations are such that it is virtually impossible to conclude that they could have effected the results of the election.

Applying the foregoing standard to the election in the present case, the election must be set aside by reason of the Company's unlawful conduct.

I further find that a cease and desist order is warranted with respect to all violations found herein including threats of plant closure, discharge and refusal to bargain in good faith. In *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), the Board held as follows:

> It is settled that under certain circumstances an employee may relieve himself of liability for unlawful conduct by repudiating the conduct. To be effective, however, such repudiation must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." *Douglas Division, The Scott & Fetzer Company*, 228 NLRB 1016 (1977), and cases cited therein at 1024. Furthermore, there must be adequate publication of the repudiation to the employees

> involved and there must be no proscribed conduct on the employer's part after the publication. *Pope Maintenance Corporation*, 228 NLRB 326, 340 (1977). And, finally, the Board has pointed out that such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section rights. See *Fashion Fair, Inc., et al.*, 159 NLRB 1435, 1444 (1966); *Harrah's Club*, 150 NLRB 1702, 1717 (1965).

John Koons' post-party apology to employees Kubert and Pierson, and the speeches of Hendrick and Koons on January 5 and 10 respectively, in which they asserted that the Company would not close but would bargain in good faith, fail to meet the above standard. Koons said nothing to Donald West, who heard Koons tell Pierson that he put his job on the line, nor to any other employees who may have heard about the incident at the Christmas party. Koons waited until over 3 weeks after the party, and even longer after Tomarchio had made a similar threat, to assert that he would not close the dealership. In the meantime, the Company permitted the impact of these and other threats to settle in the minds of the employees. When Koons finally got around to making this assertion, he referred only to alleged rumors of closure, without acknowledging that he personally was responsible for such rumors. Moreover, the statements of Hendrick and Koons were accompanied by and occurred in the context of other statements and actions which for all practical purposes nullified their promise to bargain in good faith. Thus in the same speech that Hendrick made this promise, he threatened the employees with loss of various benefits if the Union came in. At the very time they made these promises, they were in the process of granting substantial wage increases in order to discourage employee support for the Union. Neither Koons nor Hendricks made any reference to the unlawful actions of Tom-

archio and Sherbert. Therefore a conventional cease and desist order is warranted. *Passavant, supra*; see also, *Safeway Stores, Inc.*, 266 NLRB No. 196, sl. op. 4-5 (1983).

The more difficult question is whether by reason of the Company's unlawful conduct, I should find that the Company unlawfully failed or refused to recognize and bargain with the Union, and therefore, that a remedial bargaining order is warranted. The applicable standard is set forth in the landmark case of *N.L.R.B.* v. *Gissel Packing Company*, 395 U.S. 575, 613-615 (1969). In *Gissel* the Supreme Court held as follows:

> – Before considering whether the bargaining orders were appropriately entered in these cases, we should summarize the factors that go into a determination. Despite our reversal of the Fourth Circuit below in Nos. 573 and 691 on all major issues, the actual area of disagreement between our position here and that of the Fourth Circuit is not large as a practical matter. While refusing to validate the general use of a bargaining order in reliance on cards, the Fourth Circuit nevertheless left open the possibility of imposing a bargaining order, without need of inquiry into majority status on the basis of cards or otherwise, in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices. Such an order would be an appropriate remedy for those practices, the court noted, if they are of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." *N.L.R.B.* v. *Logan Packing Co.*, 386 F.2d 562, 570 (CA. 4th Cir., 1967); see also *N.L.R.B.* v. *Heck's Inc.*, 398 F.2d 377, 388. The Board itself, we should add, has long had a similar policy of issuing a bargaining order, in the absence of a 8(a)(5) violation or even a bargaining demand, when that was the

only available, effective remedy for substantial unfair labor practices. See e.g., *United Steelworkers of America* v. *N.L.R.B.*, 126 U.S. App. D.C. 215, 376 F.2d 770 (1967); *J. C. Penney Co., Inc.*, v. *N.L.R.B.*, 384 F.2d 479, 485-486 (C.A. 10th Cir. 1967).

The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior. In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuing a fair election (or a fair rerun) by the use of traditional remedies, through present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue (see n.32, *supra*).

We emphasize that under the Board's remedial power there is still a third category of minor or less extensive unfair labor practices, which because of their minimal impact on the election machinery, will not sustain a bargaining order. There is, the Board says, no *per se* rule that the commission of any unfair practice will automatically result in a 8(a)(5)

violation and the issuance of a order to bargain. See *Aaron Brothers, supra.*

If John Koons had not backed away from his prior threat, this case would plainly constitute a Class I *Gissel* case, i.e., an exceptional case marked by outrageous and persuasive unfair labor practices; in which the unfair labor practices themselves without further analysis of the factual context, would warrant issuance of a remedial bargaining order. See, *Gissell*, 395 U.S. at 587-89, 615 (the *Sinclair* case). Although Koons' disclaimers were inadequate to preclude a conventional cease and desist order, they must be considered as part of the overall factual context in determining the propriety of a bargaining order. Upon consideration of that context, I find that the Company has engaged in a pattern of unremedied unfair labor practices which effectively destroyed the conditions for a free and fair election, that those conditions probably cannot and will not be restored at any time in the foreseeable future, and that therefore a bargaining order is warranted, based on the Union's majority status as of November 23 and 24, when it requested recognition and petitioned for a Board-conducted election. The present case presents an almost textbook example of the "fist inside the velvet glove." *N.L.R.B.* v. *Exchange Parts*, 375 U.S. 405, 409 (1964). The Company through its supervisory personnel repeatedly hammered home the theme that unionization would *per se* result in the loss of a wide range of privileges and benefits which were important to the employees, e.g., job security, employer assistance, access to management, hobby night, working on cars outside the job, parts discount, opportunity for schooling advancement, drinking beer after work, and the annual Christmas party. These threats for all practical purposes nullified the Company's belated assertion that it would bargain in good faith. Moreover the employees were well aware that retention of some of these privileges and benefits were dependent

on employer good will or other subjective or variable factors within the Company's control, e.g., the extent to which the service manager might grant more time to a mechanic on a flat rate job. Therefore it is unlikely that the posting of a Board notice (and that essentially is all that a conventional Board order could provide in this case) would offer much assurance to the employees. See, *E. S. Merriman & Sons*, 219 NLRB 972 (1975), enf'd. as modified w/o opinion. 99 LRRM 2634 (9th Cir., 1978).[25] Most serious, however, were the pay increases granted shortly before the election. In these cases, the Board does not punish the employees by depriving them of such benefits. Essentially all the Board can do is to tell the employer not to do it again. This would be a case of locking the barn door after the horses were stolen. By its unlawful actions (most conspicuously in the situation of the body shop employees) the Company at the very last minute acted to redress employee grievances which gave rise to the organizational campaign, and granted pay increases which were designed to discourage support for the Union.[26] The impact of such actions, coupled with the Company's unlawful threats, cannot easily be forgotten. Therefore the Board, with judicial approval, has issued remedial bargaining orders in cases involving comparable or even less serious employer misconduct. See *Tipton Electric Co.* v. *N.L.R.B.*, 621 F.2d 890, 898-899 (8th Cir., 1980) (threats of loss of access to management and harmonious working relationship, coupled with promised improvements in pay policy which were granted shortly after the election); *N.L.R.B.* v. *Colonial Knitting Company*, 464 F.2d 949, 952 (3rd

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[25] Even a subsequently apology could not reasonably be expected to wipe out an implied threat of discharge from the Company's president. As Pierson put it on cross-examination: "It's going to stick in my mind for a long time."

[26] As indicated, the vote in the election was 27 to 39. The votes of the 9 body shop employees alone might well have been decisive.

Cir. 1972) (interrogation of an employee and pay raises granted on the day before the election); *Keystone Pretzel Bakery, Inc.*, 696 F.2d 257, 263-265 (3rd Cir., *en banc*, 1982) (authorizing employee to conduct surveillance, interrogation, solicitation and promise to resolve grievances and grant benefits, and polling employees); *Gordonsville Industries, Inc., supra*, 258 NLRB at 603 (promise and grant of general wage increases deemed sufficient to warrant bargaining order even without consideration of other unfair labor practices); *Michigan Products, Inc.*, 236 NLRB 1143, 1147 (1978) (promises of wage increases and benefits and to deal directly with employee committee).

I further find that neither the passage of time nor employee turnover is likely to result in conditions which would allow uncoerced employee choice in a free and fair election. I have already discussed some of the reasons for this finding. The Company presented evidence that as of the close of the hearing (October 18, 1983), 24 of the 66 employees in the unit as of January 10 were no longer employed by the Company, and one was no longer in the unit. The evidence indicates that there is substantial turnover among the Company's younger, unskilled employees, e.g., porters, helpers and make-ready employees. However the evidence also indicates that there is much greater stability at higher levels of progression, particularly among the line mechanics and those on commission. Thus, among the employees who were still in the unit as of the close of the hearing, Smith was employed by the Company for 7 years, Kubert for 9 years, Cully for 4 years, Cole for 7 years, Felesky for 15 years, Pierson for 15 years, Lawrence for 5 years, Archie Brown for 11 years, Henry Brown for 15 years, George Marski for 11 years, Russell for 5 years, Strittmatter for 38 years, and John Chambers for 23 years. These employees included the principal union adherents and employees who were direct targets of the Company's unfair

labor practices. It is evident that it will be a long time before the 1982-83 election campaign is forgotten at the Company and before the effects of the Company's unlawful conduct can be dissipated. See, *E. S. Merriman & Sons, supra,* 219 NLRB at 973.

I find that the Company violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union on and after November 24, 1982, as the exclusive representative of its employees in the appropriate unit. It follows that the Company further violated Section 8(a)(5) and (1) by granting bonuses to its make-ready workers in December and by granting wage increases, a higher wage rate and unscheduled bonuses to unit employees in January, without giving the Union notice or an opportunity to bargain concerning such matters. *Trading Port, Inc.*, 219 NLRB 298, 302 (1975).

Conclusions of Law

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All full time and regular part time Service Department employees, including mechanics, body and paint shop workers, parts department employees, drivers, helpers, make-ready employees, porters, dispatchers and janitors employed at Respondent's Annapolis, Maryland, facility but excluding sales persons, office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. By discriminatorily granting wage increases, higher wage rates and bonuses to its employees in order to discourage support for the Union, the Company has engaged

and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

5. By granting such increases, by threatening its employees with plant closure, loss of employment and other reprisals if they choose the Union as their bargaining representative, by coercively interrogating its employees concerning their union activity and that of their fellow employees, and by soliciting employees to engage in anti-union activity, the Company has interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, and thereby has violated and is violating Section 8(a)(1) of the Act.

6. Union objections, 1, 2, 3, 4, 9, 11, 12, 13 and 15 in Case 5-RC-11899 have been sustained by the evidence, and the Company thereby interfered with the Board election on January 12, 1983. Union objections 6 and 10 are overruled.

7. By the conduct set forth in paragraphs 3 and 4 above, the Company interfered with the employees' freedom of choice in the election, and precluded any reasonable possibility of a fair and uncoerced rerun election.

8. Since November 24, 1982, the Union has been and is, the exclusive collective-bargaining representative of the Company's employees in the unit described below.

9. By failing and refusing since November 24, 1982, to recognize and bargain with the Union as the exclusive bargaining representative of the employees in the above appropriate unit, and by unilaterally changing the wages of its employees without giving the Union notice or an opportunity to bargain concerning such matters, the Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

10. The aforesaid labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Company has committed violations of Section 8(a)(1), (3) and (5) of the Act, I shall recommend that it be required to cease and desist therefrom and from in any like or related manner infringing upon the rights guaranteed its employees in Section 7 of the Act. As heretofore found, affirmative relief is also appropriate here. I shall direct the Company to recognize and to bargain collectively, upon request, with the Union as the exclusive bargaining representative of the employees in the unit found appropriate herein, and to embody any understanding reached in a signed agreement. The remedial order will also include the customary provisions relating to the posting of notices and related matters.

Finally, I shall recommend that the election in Case 5-RC-11899 be set aside and, in view of the bargaining order entered herein, that Case 5-RC-11899 be dismissed.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: [27]

ORDER

Respondent Koons Ford of Annapolis, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Threatening its employees with plant closure, loss of jobs, job security, or opportunity for advancement,

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[27] In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

loss of access to or help from management, loss of privileges or benefits of employment, more onerous working conditions, futile contract negotiations or other reprisals, if they designate, select or support District 65, United Automobile, Aerospace and Agricultural Implement Workers of America or any other labor organization as their bargaining representative.

(b) Coercively interrogating employees about their union attitude or activities or those of their fellow employees.

(c) Soliciting employees to engage in antiunion activity.

(d) Granting wage increases or other improvements in terms and conditions of employment, or redressing grievances, in order to discourage support for the Union; provided however, that nothing herein shall be construed as requiring Respondent to vary or abandon any economic benefit or any term or condition of employment which it has heretofore established.

(e) Refusing to recognize or bargain collectively with the Union as the exclusive collective-bargaining representative of its employees in the above described appropriate unit.

(f) Unilaterally changing wages or other terms or conditions of employment without prior notice to the Union or without affording the Union an opportunity to negotiate and bargain concerning such matters.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act, as amended.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Recognize and upon request, bargain collectively in good faith with the Union as the exclusive bargaining

representative of the employees in the unit described above, and embody in a signed agreement any understanding reached.

(b) Post at its office and place of business in Annapolis, Maryland, copies of the attached notice marked "Appendix."[28] Copies of the notice on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director for Region 5, in writing, within 20 days from the date of the receipt of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the election in Case No. 5-RC-11899 be set aside and that the said proceeding be dismissed.

Dated, Washington, D.C. May 30, 1984

/s/ Marvin Roth
MARVIN ROTH
Administrative Law Judge

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[28] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

JD-222-84

NOTICE TO EMPLOYEES

[SEAL] [SEAL]

Posted By Order of the
National Labor Relations Board
An Agency of the
United States Government

AFTER A HEARING AT WHICH ALL SIDES HAD AN OPPORTUNITY TO PRESENT EVIDENCE AND STATE THEIR POSITIONS, THE NATIONAL LABOR RELATIONS BOARD FOUND THAT WE HAVE VIOLATED THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, AND HAS ORDERED US TO POST AND ABIDE BY THIS NOTICE.

WE WILL NOT threaten you with plant closure, loss of jobs, job security or opportunity for advancement, loss of access to or help from management, loss of privileges or benefits of employment, more onerous working conditions, futile contract negotiations or other reprisals, if you designate, select or support DISTRICT 65, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA or any other labor organization as your bargaining representative.

WE WILL NOT coercively question you about your union attitude or activities or those of your fellow employees.

WE WILL NOT solicit you to engage in antiunion activity.

WE WILL NOT grant wage increases or other improvements in terms and conditions of employment, or remedy grievances, in order to discourage support for DISTRICT 65; provided however, that nothing

herein requires us to vary or abandon any economic benefit or any term or condition of employment which we have heretofore established.

WE WILL NOT refuse to recognize or bargain collectively with DISTRICT 65 as the exclusive bargaining representative of our employees in the following appropriate unit:

> All full time and regular part time Service Department employees, including mechanics, body and paint shop workers, parts department employees, drivers, helpers, make ready employees, porters, dispatchers, and janitors employed at our Annapolis, Maryland, facility, but excluding sales persons, office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally change wages or other terms or conditions of employment without prior notice to DISTRICT 65 or without affording DISTRICT 65 an opportunity to negotiate and bargain concerning such matters.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your right to engage in union or concerted activities, or to refrain therefrom.

WE WILL recognize and upon request, bargain collectively in good faith with DISTRICT 65 as the exclusive bargaining representative of our employees in the unit described above, and embody in a signed agreement any understanding reached.

KOONS FORD OF ANNAPOLIS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

A-133

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office,

Candler Building, 4th Floor, 109 Market Place, Baltimore, Maryland 21202. Telephone No. (301) 962-2772.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

Cases 5-CA-17683
5-CA-17770
5-CA-17917
5-CA-17933

KOONS FORD OF ANNAPOLIS, INC.

and

DISTRICT 65, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA

ORDER

On February 9, 1987, Counsel for the General Counsel filed with the undersigned a motion to sever cases and for permission to amend complaints, for the purpose of enabling the parties hereto to settle these cases. Respondent and Charging Party having expressed no objection to the motion, and upon consideration thereof, it is,

ORDERED that the charge in Case 5-CA-17770 be, and it hereby is, severed from the Order Consolidating Cases, Amended Consolidated Complaint, Second Consolidated Complaint and Notice of Hearing in this matter dated May 23, 1986, and it is further,

ORDERED that Counsel for the General Counsel is granted leave to amend the complaint in case 5-CA-17770,

and to amend the complaint in Cases 5-CA-17683, 5-CA-17917 and 5-CA-17933, by having the Regional Director issue amended complaints in each situation.

Dated at Washington, D.C. this 2d day of March 1987.

/s/ Benjamin Schlesinger
BENJAMIN SCHLESINGER
Administrative Law Judge
National Labor Relations Board

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-3801

KOONS FORD OF ANNAPOLIS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

[Filed Dec. 11, 1987]

ORDER

The petitioner's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Russell, with the concurrence of Chief Judge Winter and Judge Widener.

For the Court.

/s/ John M. Greacen
Clerk

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case Nos. 5-CA-17683
5-CA-17770
5-CA-17917
5-CA-17933

KOONS FORD OF ANNAPOLIS, INC.,
Respondent,

and

DISTRICT 65, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA,
Charging Party.

MOTION OF RESPONDENT, KOONS FORD OF ANNAPOLIS, INC., TO EXTEND TIME FOR FILING POST-HEARING BRIEFS

Koons Ford of Annapolis, Inc. ("Respondent"), pursuant to Section 102.42 of the Rules and Regulations of the National Labor Relations Board, Series 8 (as amended), hereby submits its Motion to Extend Time for Filing Post-Hearing Briefs to February 6, 1987. Respondent believes the granting of additional time will promote the convenience of the parties and the interest of the public in that such extension will allow Respondent, Counsel for the General Counsel, the Charging Party, and interested dischargees to (1) review properly the effects of the recent Board decision in *Koons Ford of Annapolis, Inc.*, 282 N.L.R.B. No. 88 (December 24,

1986), and (2) to engage in settlement discussions in light of such decision.

In support of its Motion to Extend Time, Respondent avers as follows:

1. The hearing in this proceeding before Administrative Law Judge Benjamin Schlesinger extended for 21 days on the record between July 7 and August 28, 1986.

2. The post-hearing briefs of the parties currently are due to be filed on or before January 16, 1987.

3. The record in this proceeding consists of in excess of 4,000 pages of transcript and voluminous exhibits.

4. Two previous extensions of time have been granted for the parties to file their post-hearing briefs.

5. This proceeding involves, in part, alleged Section 8(a)(5) violations in the nature of asserted unilateral changes in economic benefits and the asserted unilateral implementation of a new productivity standard, pursuant to which three employees were discharged.

6. At the hearing in this proceeding, Counsel for the General Counsel relied solely upon a prior, non-final recommended decision of Administrative Law Judge Marvin Roth as evidence of Respondent's duty to bargain with the Charging Party in this proceeding. The parties have litigated strenuously the propriety of reliance upon such non-final decision and Respondent has structured much of its defense upon such issue.

7. The Board recently has issued a decision in *Koons Ford of Annapolis, Inc.*, 282 N.L.R.B. No. 88 (December 24, 1986), which affirmed the recommended bargaining order of Judge Roth. Such decision, received by the parties after the Christmas holidays, may affect significantly the issues in this proceeding.

8. On December 29, 1986, Judge Schlesinger communicated by telephone with Counsel for the General Coun-

sel and Counsel for Respondent concerning the issuance of the *Koons* decision and urged the parties to consider whether renewed settlement discussions would be useful. In this regard, Judge Schlesinger advised that he would deem appropriate a reasonable extension of between two and four weeks for the parties to file their briefs in this proceeding.

9. Counsel for Respondent and Counsel for the General Counsel have agreed by telephone this day to engage in settlement discussions as soon as reasonably feasible. In this regard, Counsel for the General Counsel advised he would require reasonable time to confer in advance of such discussions with each of the three discharges and the Charging Party.

10. Counsel for the General Counsel has advised he concurs in the request for an extension of time to file briefs until February 6, 1986. Counsel for Respondent has been unable to communicate this day with the representative of the Charging Party to determine his position on the Motion to Extend Time.

11. A grant of the extension of time requested will not inconvenience any party or prejudice their rights in this proceeding. After the lengthy and extensive litigation that already has occurred in this proceeding, a grant of the short extension of time requested will not unduly delay the conclusion of this proceeding before the Board.

12. Since the deadline for filing post-hearing briefs in this proceeding currently is January 16, 1987, Respondent and Counsel for the General Counsel respectfully request expedited action and notification of the Chief Administrative Law Judge's decision concerning this motion.

WHEREFORE, Respondent Koons Ford of Annapolis, Inc., with the consent of Counsel for the General Counsel, moves the Chief Administrative Law Judge to extend the

time for filing post-hearing briefs in this proceeding until February 6, 1987.

Respectfully submitted,

DONOVAN LEISURE
NEWTON & IRVINE

By: /s/ Robert E. Campbell
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(202) 862-4700

Counsel for Respondent,
Koons Ford of Annapolis, Inc.

January 6, 1987

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 1987, I have served true and accurate copies of this Motion upon all parties of record by certified U.S. mail, postage prepaid, as follows:

Mr. Larry T. Steele
Organizer
District 65, United Automobile
Aerospace and Agricultural
Implement Workers of America,
AFL-CIO
13 Astor Place
New York, New York 10003

Joseph J. Banisjewski, Esq.
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Candler Building
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109 Market Place
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/s/ Robert E. Campbell
ROBERT E. CAMPBELL

RELEVANT STATUTORY AND REGULATORY PROVISIONS

1. Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a), provides in relevant part:

a) It shall be an unfair labor practice for an employer—

1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

2) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

3) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

2. Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

1) compel agency action unlawfully withheld or unreasonably delayed; and

2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(b) contrary to constitutional right, power, privilege, or immunity;

(c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(d) without observance of procedure required by law;

(e) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(f) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

3. Section 101.8 of the Board's Statements of Procedures, 29 C.F.R. § 101.8 (1987), provides:

Complaints

If the charge appears to have merit and efforts to dispose of it by informal adjustment are unsuccessful, the Regional Director institutes formal action by issuance of a complaint and notice of hearing. In certain types of cases, involving novel and complex issues, the Regional Director, at the discretion of the General Counsel, must submit the case for advice from the General Counsel before issuing a complaint. The complaint, which is served on all parties, sets forth the facts upon which the Board bases its jurisdiction and the facts relating to the alleged violations of law by the respondent. The respondent must file an answer to the complaint within 14 days of its receipt, setting forth a statement of its defense.

4. Section 101.9 of the Board's Statements of Procedures, 29 C.F.R. § 101.9 (1987), provides:

Settlement after issuance of complaint

a) Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or commenced, the attorney in charge of the case and the Regional Director afford all parties every opportunity for the submission and

consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit.

b)(1) After the issuance of a complaint, the Agency favors a formal settlement agreement, which is subject to the approval of the Board in Washington, D.C. In such an agreement, the parties agree to waive their right to hearing and agree further that the Board may issue an order requiring the respondent to take action appropriate to the terms of the settlement. Ordinarily the formal settlement agreement also contains the respondent's consent to the Board's application for the entry of a judgment by the appropriate circuit court of appeals enforcing the Board's order.

b)(2) In some cases, however, the Regional Director, who has authority to withdraw the complaint before the hearing § 102.18), may conclude that an informal settlement agreement of the type described in § 101.7 is appropriate. Such agreement is not subject to approval by the Board and does not provide for a Board order. It provides for the withdrawal of the complaint.

c)(1) If after issuance of a complaint but before opening of the hearing, the charging party will not join in a settlement tentatively agreed upon by the Regional Director, the respondent, and any other parties whose consent may be required, the Regional Director serves a copy of the proposed settlement agreement on the charging party with a brief written statement of the reasons for proposing its approval. Within 7 days after service of these documents, the charging party may file with the Regional Director a written statement of any objections to the proposed settlement. Such objections will be considered by the Regional Director in determining whether to approve the proposed settlement. If the settlement is approved by the Regional Director notwithstanding the objections, the charging party is so informed and provided a brief written statement of the reasons for the approval.

c)(2) If the settlement agreement approved by the Regional Director is a formal one, providing for the entry of a Board order, the settlement agreement together with the charging party's objections and the Regional Director's written statements are submitted to Washington, D.C., where they are reviewed by the General Counsel. If the General Counsel decides to approve the settlement agreement, the charging party is so informed and the agreement and accompanying documents are submitted to the Board, upon whose approval the settlement is contingent. Within 7 days after service of notice of submission of the settlement agreement to the Board, the charging party may file with the Board in Washington, D.C., a further statement in support of objections to the settlement agreement.

c)(3) If the settlement agreement approved by the Regional Director is an information one, providing for the withdrawal of the complaint, the charging party may appeal the Regional Director's action to the General Counsel, as provided in § 102.19 of the Board's Rules and Regulations.

d)(1) If the settlement occurs after the opening of the hearing and before issuance of the administrative law judge's decision and there is an all-party informal settlement, the request for withdrawal of the complaint must be submitted to the administrative law judge for approval. If the all-party settlement is a formal one, final approval must come from the Board. If any party will not join in the settlement agreed to by the other parties, the administrative law judge will give such party an opportunity to state on the record or in writing its reasons for opposing the settlement.

d)(2) If the administrative law judge decides to accept or reject the proposed settlement, any party aggrieved by such ruling may ask for leave to appeal to the Board as provided in § 102.26.

e)(1) In the event the respondent fails to comply with the terms of a settlement stipulation, upon which a Board

order and court judgment are based, the Board may petition the court to adjudge the respondent in contempt. If the respondent refuses to comply with the terms of a settlement stipulation providing solely for the entry of a Board order, the Board may petition the court for enforcement of its order pursuant to section 10 of the National Labor Relations Act.

e)(2) In the event the respondent fails to comply with the terms of an informal settlement agreement, the Regional Director may set the agreement aside and institute further proceedings.

4. Section 102.48 of the Board's Rules and Regulations, 29 C.F.R. § 102.48 (1987), provides:

Action of the Board upon expiration of time to file exceptions to the administrative law judge's decision; decisions by the Board; extraordinary postdecisional motions.

a) In the event no timely or proper exceptions are filed as herein provided, the findings, conclusions, and recommendations of the administrative law judge as contained in his decision shall, pursuant to section 10(c) of the Act, automatically become the decision and order of the Board and become its findings, conclusions, and order, and all objections and exceptions thereto shall be deemed waived for all purposes.

b) Upon the filing of timely and proper exceptions, and any cross-exceptions, or answering briefs, as provided in § 102.46, the Board may decide the matter forthwith upon the record, or after oral argument, or may reopen the record and receive further evidence before a member of the Board or other Board agent or agency, or may make other disposition of the case.

c) Where exception is taken to a factual finding of the administrative law judge, the Board, in determining whether the finding is contrary to a preponderance of the evidence, may limit its consideration to such portions

of the record as specified in the exceptions, the supporting brief, and the answering brief.

d) (1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing *de novo* and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

d) (2) Any motion pursuant to this subsection shall be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence. Any request for an extension of time must be received by the Board 3 days prior to the due date and copies thereof shall be served promptly on the other parties.

d) (3) The filing and pendency of a motion under this provision shall not operate to stay the effectiveness of the action of the Board unless so ordered. A motion for reconsideration or for rehearing need not be filed to exhaust administrative remedies.

Supreme Court, U.S.
FILED
MAR 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

KOONS FORD OF ANNAPOLIS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

DISTRICT 65, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR MARYLAND NEW CAR AND TRUCK DEALERS ASSOCIATION AND THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION AS AMICI CURIAE SUPPORTING THE PETITIONER

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QUESTION PRESENTED

Whether the Court of Appeals denied the Employer a fair hearing and undermined the sound public policy favoring settlements by *sua sponte* using a settlement agreement which contained a "non-admissions" clause to find that the Employer had engaged in the misconduct resolved by the settlement.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE MARYLAND NEW CAR AND TRUCK DEALERS ASSOCIATION AND THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION	1
STATEMENT OF THE CASE	2
REASONS THE WRIT SHOULD BE GRANTED	4
CONCLUSION	9

TABLE OF AUTHORITIES

Cases:	Page
Breuer Electric Mfg. Co. v. Toronado Systems of America, Inc., 687 F.2d 182 (7th Cir. 1982)	5
Burns v. City of Des Peres, 534 F.2d 103 (8th Cir.), *cert. denied*, 429 U.S. 861 (1976)	6
General Steel Products, Inc. v. NLRB, 445 F.2d 1350 (4th Cir. 1971)	3
Home Insurance Co. v. Baltimore Warehouse Co., 93 U.S. 527 (1876)	6
NLRB v. Apple Tree Chevrolet, Inc., 671 F.2d 838 (4th Cir. 1982)	3
NLRB v. Bangor Plastics, Inc., 392 F.2d 772 (6th Cir. 1967)	6
NLRB v. Gissel Packing Co., 395 U.S. 575 (1969)	2
NLRB v. Indiana & Michigan Electric Co., 318 U.S. 9 (1943)	7
NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438 (1965)	7
NLRB v. United Food & Comm'l Workers Union, —— U.S. ——, 108 S.Ct. 413 (1987)	8
Ohio Bell Telephone Co. v. Public Utilities Comm. of Ohio, 301 U.S. 292 (1937)	7
Schware v. Board of Bar Examiners, 353 U.S. 232 (1957)	7
SEC v. Chenery Corp., 317 U.S. 80 (1943)	7
W.B. Johnston Grain Co. v. NLRB, 365 F.2d 582 (10th Cir. 1966)	7
West v. Smith, 101 U.S. 263 (1879)	6

Statutes and Rules:

National Labor Relations Act, 29 U.S.C. § 151, *et seq.*:	
§ 1(b), 29 U.S.C. 151(b)	8
§ 10(b), 29 U.S.C. 160(b)	5
§ 10(c), 29 U.S.C. 160(c)	5
§ 10(e), 29 U.S.C. 160(e)	5

TABLE OF AUTHORITIES—Continued

	Page
Federal Rules of Evidence, 28 U.S.C.A.	
Rule 102	6
Rule 408	5, 6
Rule 1101	5
Rules of the Supreme Court, 28 U.S.C.A.	
Rule 17.1(a)	5
Miscellaneous:	
NLRB General Counsel's Report Summarizing Operations in Fiscal Year 1986, 124 L.R.R. 158	8
Cleary, McCormick on Evidence (2d ed. 1972)	6
Maguire, Evidence—Common Law and Common Sense (1947)	6
Moore & Bendix, Moore's Federal Practice (1987)	6
10 § 102.02	6
10 § 408.02	6, 7

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INTEREST OF NATIONAL AUTOMOBILE DEALERS ASSOCIATION AND MARYLAND NEW CAR AND TRUCK DEALERS ASSOCIATION

The National Automobile Dealers Association is a trade association with offices in Washington, D.C., representing over 20,000 franchised automobile and truck dealers located throughout the United States. The Maryland New Car and Truck Dealers Association is a trade association with offices in Baltimore, Maryland,

representing over 300 automobile and truck dealers located in Maryland. Both associations have a strong interest in labor relations issues that impact upon their members. In this particular case, both associations apprehend that the decision below poses a threat to their members' ability to voluntarily settle unfair labor practice cases before the National Labor Relations Board without the disquieting risk that such a settlement will subsequently be interposed as proof of wrongdoing in other proceedings. The associations seek to participate as *amici curiae* in support of the Petitioner because they believe the experience of their members in participating in cases before the National Labor Relations Board would be instructive in reaching an appropriate resolution of the issues presented by the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

On January 12, 1983, the National Labor Relations Board ("NLRB") conducted an election among service employees of Koons Ford of Annapolis, Inc. ("Koons" or "the Employer") to determine whether they wished to be represented by District 65, United Automobile, Aerospace and Agricultural Implement Workers of America ("the Union"). Koons' employees rejected the Union by a vote of 39 to 27. (A. 47.) The Union filed objections to the election and unfair labor practice charges, and on May 30, 1984, an NLRB Administrative Law Judge ("ALJ") issued a recommended decision finding that Koons had committed unfair labor practices. The ALJ recommended that the NLRB issue an order directing Koons to recognize and negotiate with the Union, pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). (A. 46-133.)

Koons filed exceptions to the ALJ's recommended decision and order. On three separate occasions while the exceptions were pending before the NLRB, Koons filed motions to reopen the record and to introduce evidence of

changes in ownership, management and employees at the dealership. The motions were intended to show to the NLRB that circumstances had changed sufficiently to permit and require a re-run election, instead of the more drastic remedy of a bargaining order. The NLRB issued its decision on December 24, 1986, affirming the ALJ's finding and issuing a bargaining order. The NLRB summarily denied the three motions to reopen the record on the grounds that "the evidence sought to be adduced would not require a different result." (A. 40 n. 18.) The Employer and the NLRB petitioned the United States Court of Appeals for the Fourth Circuit for review and enforcement, respectively, of the NLRB's order.

While the case was pending before the Court of Appeals, the Employer and the NLRB settled other unfair labor practice charges alleged in a separate proceeding. The duly executed settlement stipulation contained a "non-admissions" clause expressly stating that the Employer did not admit the charges. Pursuant to the Employer's and the NLRB's stipulation, the Settlement Agreement was filed with the United States Court of Appeals for the Fourth Circuit for *pro forma* enforcement of its remedial provisions.

In its opposition to enforcement of the bargaining order, Koons argued to the Court of Appeals that the NLRB had erred in not taking into account changes in circumstances which, according to Koons, made the bargaining order inappropriate. Koons cited *General Steel Products, Inc. v. NLRB*, 445 F.2d 1350 (4th Cir. 1971) and *NLRB v. Apple Tree Chevrolet, Inc.*, 671 F.2d 838 (4th Cir. 1982), as authority for the proposition that the NLRB must consider evidence of changed circumstances in deciding whether to issue a bargaining order.

Without addressing whether the NLRB had adequately considered Koons' proffered evidence of changed circumstances, the Court of Appeals rejected Koons' argument and enforced the bargaining order. The Court of Appeals

stated that a bargaining order is in the nature of an equitable remedy, and that the employer who seeks to reverse such an order must therefore have "clean hands." The Court found that review of the previously enforced settlement agreement revealed that Koons' hands were not "clean." The Court of Appeals stated that while Koons did not admit the violations settled by the stipulation, Koons had "consented to an extensive order requiring compliance with the Act and providing for full and immediate reinstatement" and back pay.[1] (A. 6.) Stating that it had reviewed the record of the settled proceedings, the Court concluded that summary enforcement was appropriate because it would be "a waste of judicial time to remand this cause to the [NLRB] to consider the 'clean hands' issue." (A. 6.) In short, the Court of Appeals clearly relied upon a settlement stipulation containing a non-admissions clause as evidence that the Employer had committed the misconduct covered by the settlement agreement.

REASONS THE WRIT SHOULD BE GRANTED

The Court of Appeals concluded from a settlement agreement that the Employer had engaged in the misconduct alleged in the settled proceedings and thus had "unclean hands." The Court's use of the settlement agreement for this purpose was improper because settlement agreements are not competent evidence from which to conclude that a party engaged in misconduct. The Court of Appeals' error is plain, as is the inescapable conclusion that the Court abused its discretion by disregarding settled rules of law, depriving the Employer of a fair hearing. By "so far depart[ing] from the accepted and

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[1] Rather than requiring the Employer to offer reinstatement, the stipulation and the order simply recognized that the Employer had offered reinstatement, that the employees had declined the offer, and that specified sums would be paid them as "backpay." (A. 11 and 22-23.)

usual course of judicial proceedings . . . ," the Court of Appeals' decision calls for an exercise of this Court's power of supervision. *Sup. Ct. R.* 17.1(a).

The decision below impairs the ability of any respondent in a Board proceeding to enter into a settlement agreement without taking the risk that the agreement will be viewed as an admission. This undermines the strong public policy supporting voluntary settlement of disputes, particularly labor relations disputes. The case, therefore, raises fundamentally important issues that warrant review by this Court.

1. Evidence of Settlement is Not Competent as Evidence That a Party Committed the Wrong Alleged.

The Court's finding of misconduct based on a settlement agreement violated well established rules of law and sound public policy. Assuming *arguendo* that the Court of Appeals could make *de novo* findings of fact,[2] its fact-finding is subject to the Federal Rules of Evidence. *Fed. R. Evid.* 1101(a). See also 29 U.S.C. § 160(b). Rule 408 of the Federal Rules of Evidence directs in unambiguous terms that "[e]vidence of . . . accepting . . . consideration in compromising . . . a claim which was disputed . . . is not admissible to prove liability for . . . the claim . . . ." See also *Breuer Electric Manufacturing Co. v. Toronado Systems of America, Inc.*, 687 F.2d 182, 185 (7th Cir. 1982) ("Rule 408 controls when evidence of settlement attempts is offered 'to prove *lia-*

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[2] The National Labor Relations Act ("the Act") commits the fact-finding function to the NLRB or its agents. 29 U.S.C. § 160 (b) & (c). Where the taking of additional evidence after an appeal is deemed appropriate, the Act instructs a court of appeals to remand the case to the NLRB for the necessary findings. 29 U.S.C. 160(e). There is no support, nor did the Court cite any, for its making *de novo* findings of fact. That error is particularly critical where—as here—newly found facts constitute the *sole* basis for a judicial decision.

bility' . . .") (emphasis in original); *Burns v. City of Des Peres*, 534 F.2d 103, 112 & n.9 (8th Cir.), *cert. denied*, 429 U.S. 861 (1976) (settlements and settlement negotiations are encompassed in *Fed. R. Evid.* 408).

This rule embodies the well established [3] and incontrovertible recognition that the motivation prompting a settlement is ambiguous and an attempt to settle may support multiple and contradictory inferences. Thus, settlement may indicate a party's view either that overcoming an opponent's claim is unlikely or, on the other hand, that peace now is preferable to victory later. *Fed. R. Evid.* 408, Advisory Committee Notes; E. Cleary, *McCormick on Evidence* §§ 74, 274 (2d ed. 1972). In light of this inherent ambiguity, the reliability of such evidence to prove the underlying claim is at best suspect. See J. Maguire, *Evidence—Common Sense and Common Law*, 20, 118, 201-202, 208-209 (1947). For this reason, the use of a settlement to establish the underlying liability defeats the central purpose of the rules of evidence—the ascertainment of truth. *Fed. R. Evid.* 102. See 10 J. Moore, H. Bendix, *Moore's Federal Practice* § 102.02 (1987) (hereafter "*Moore's Federal Practice*").

Rule 408 also serves the strong public policy favoring settlement of disputed claims. *Fed. R. Evid.* 408, Advisory Committee Notes. The rule encourages settlements by protecting settlement agreements, as well as settlement negotiations, from being used to establish the disputed claims. See 10 *Moore's Federal Practice* § 408.02.

Despite this sound and unequivocal bar to inferring liability for a settled claim from the fact of settlement,[4]

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[3] The rule barring the admission of settlements and offers to settle is a longstanding one. See, e.g., *West v. Smith*, 101 U.S. 263, 272-273 (1879); *Home Insurance Co. v. Baltimore Warehouse Co.*, 93 U.S. 527, 548 (1876).

[4] The Court of Appeals' ruling is in direct conflict with rulings in other circuits. See, e.g., *NLRB v. Bangor Plastics, Inc.*, 392 F.2d 772, 775 (6th Cir. 1967) (settlement agreement does not amount to

the Court of Appeals drew just such an inference and relied on it exclusively in finding "unclean hands."[5] This Court has long recognized that such a fundamental departure from established law may give rise to a finding that the right to a fair hearing has been denied. See, e.g., *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957) (petitioner deprived of due process by State's decision based on record which had no evidence that rationally justified its findings); *Ohio Bell Telephone Co. v. Public Utilities Comm. of Ohio*, 301 U.S. 292 (1937) (decision based on evidence petitioner was given no opportunity to challenge denies due process and cannot be cured through use of "judicial notice"). The decision by the Court of Appeals deviates substantially from established rules and concepts of fundamental fairness[6] and warrants this Court's review, as requested by Petitioner.

2. The Court of Appeals' Decision Impairs the Ability of Parties to Settle Without Being Charged With An Admission.

The Court of Appeals' decision poses a palpable threat to the settlement process in NLRB cases. Implicit in any

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a finding or admission that respondent has committed an unfair labor practice); *W.B. Johnston Grain Co. v. NLRB*, 365 F.2d 582, 587 (10th Cir. 1966) (settlement agreement is "not an admission that the Company had been guilty of an unfair labor practice"). See also, *NLRB v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 18 (1943) (an unfair labor practice charge is not proof of the commission of an unfair labor practice).

[5] There is no question that the underlying claims were "disputed" or that they were compromised within the meaning of the rule. (A. 13, 16.) See 10 *Moore's Federal Practice* § 408.02.

[6] The Court simply ignored the parties' contentions with respect to the merits of the case and imposed a bargaining obligation on the Employer. (A. 4-6.) The rationality of the NLRB's decision and the substantiality of its evidentiary support have never been assessed. Instead, the decision has been upheld in reliance on "evidence" never even considered by the NLRB. Cf. *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965); *SEC v. Chenery Corp.*, 317 U.S. 80 (1943).

settlement agreement is the promise that the settlement agreement itself will not be treated as evidence of wrongdoing. Typically, as was the case here, the parties make that promise explicit, by agreeing to a non-admissions clause. The Court of Appeals' decision, if left to stand, undermines that promise and its incentive to settle by putting the party who has settled at a continued risk of being branded a law-breaker. Such an approach also undermines the bargaining process itself by preventing the parties from receiving the benefit of their bargain—that is, the negotiated promise that the settlement will not be treated as an admission.

The undesirability of such a situation cannot be overestimated. Settlements—particularly in the labor relations setting—are critical. As this Court has recognized, "settlements constitute the 'lifeblood' of the administrative process, *especially in labor relations.*" *NLRB v. United Food & Commercial Workers Union*, —— U.S. ——, 108 S. Ct. 413, 423 (1987) (emphasis supplied). That conclusion is compelled not only by the sheer volume of cases which are channeled away from litigation by settlement [7] but also by the unquestioned need for the parties to a labor dispute—employers, employees, and unions —to restore harmony and return to normalcy as quickly as possible. If, as the National Labor Relations Act says, industrial peace is at the very core of the Act,[8] it is hard to imagine how peace can be furthered by converting a "peace treaty" into a weapon that can be used against one of the disputants.

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[7] In 1986, 91.7% of the unfair labor practices charged were settled, while in 1985, the rate was even higher, at 94.4%. *NLRB General Counsel's Report Summarizing Operations in Fiscal Year 1986*, 124 L.R.R. 158, 160 (1987).

[8] 29 U.S.C. § 151(b) (the Act "safeguards commerce . . . by encouraging practices fundamental to friendly adjustment of industrial disputes arising out of differences as to . . . working conditions . . .").

Given the critical role of settlements in the labor relations field, the Court of Appeals' decision undermining the viability of the settlement process is unwise and dangerous.

In sum, the lower court's decision seriously undermines the security of settlement agreements and discourages the parties' resort to settlement as a means of amicably and finally resolving their disputes without the need for litigation. The importance of the settlement practices which are jeopardized by the Court of Appeals compels the review requested by Petitioner.

CONCLUSION

For the reasons stated above, the National Automobile Dealers Association and the Maryland New Car and Truck Dealers Association request that this Court grant the Petitioner's request for a Writ of Certiorari.

Respectfully submitted,

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Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and DISTRICT 65, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Respondents.

BRIEF OF AMICUS CURIAE CENTER ON NATIONAL LABOR POLICY, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
BRIEF OF AMICUS CURIAE CENTER ON NATIONAL LABOR POLICY, INC. IN SUPPORT OF PETITIONER	1
I. INTEREST OF AMICUS	1
II. ISSUE PRESENTED	7
III. SUMMARY OF ARGUMENT	8
IV. THE JUDICIAL IMPLICATION OF GUILT ON THE BASIS OF NLRB SETTLEMENT AGREEMENTS IS CONTRARY TO THE NLRA	9
V. THE "CLEAN HANDS" MAXIM CANNOT BE APPLIED TO MATTERS OUTSIDE THE UNIQUE CONTROVERSY AT ISSUE BETWEEN THE LITIGANTS AT BAR	19
CONCLUSION	30

TABLE OF AUTHORITIES

CASES	PAGE
Bias v. Bias, 109 W.Va. 621, 155 S.E. 898 (1930).....	21
Breen v. ILGWU, No. 83-1791.....	4
Archie E. Brown v. FEC, No. 81-1905.....	4
Cambridge Taxi Co., 260 N.L.R.B. No. 119, 109 L.R.R.M. 1241 (1982).....	15,16
Collens v. New Canaan Water Co., 155 Conn. 477, 234 A.2d 825 (1967).	27
Conair Corp., 261 N.L.R.B. 1189 (1982).....	2
Connell Construction Co. v. Plumbers and Steamfitters, Local No. 100, 421 U.S. 616 (1975).....	3
Dickerson v. Murfield, 173 Or. 662, 147 P.2d 194 (1944).....	25
E.S.I. Meats, Inc., 270 N.L.R.B. No. 212, 117 L.R.R.M. 1065 (1984).....	16
Garber v. Crews, 324 U.S. 200 (1945).....	20
Hoehn v. Crews, 144 F.2d 665 (10th Cir. 1944).....	20
Johnson v. Yellow Cab Transit Co., 321 U.S. 383 (1944).....	27

Kiefer-Stewart Co. v. Joseph Segram & Sons, 340 U.S. 211 (1951)..... 28

Lyman v. Lyman, 90 Conn. 399, 97 A. 312 (1916).....21,22

Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852 (5th Cir. 1979)..... 28

Mosley v. Magnolia Petroleum Co., 45 N.M. 230, 114 P.2d 740 (1940)... 23

Larry V. Muko, Inc. v. NLRB, No. 80-1798..... 4

New York Telephone Co. v. N.Y.S Dept. of Labor, No. 77-961..... 4

Nishman v. DeMarco, 479 N.Y. S.2d 185, 468 N.E.2d 23 (1984)..... 23

NLRB v. Bangor Plastics, Inc., 392 F.2d 772 (6th Cir. 1967)..... 10

NLRB v. Gissell Packing Co., 396 U.S. 575 (1969)..... 2,23

NLRB v. UFCW, Local 23, 108 S.Ct. 413 (1987)..... 11,13

Perma-Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968)..... 27,29

Precision Instrument Mfg. Co. v. Automotive Mach. Co., 324 U.S. 806 (1944)..... 12,25

Donald Schriver, et al. v. Pennsylvania Building and Construction Trades Council, No. 80-1257... 4

United Board & Carton Co. v. Britting, 61 N.J. Super. 340, 160 A.2d 660 (App. Div. 1960)..... 23

U.S. Contractors v. NLRB, 697 F.2d 692 (5th Cir. 1983)..... 11

Vulcan Detinning Co. v. American Can Co., 72 N.J.Eq. 397, 67 A. 339 (1907)..... 23

Wallace Corp. v. NLRB, 323 U.S. 253 (1944)..... 11,24

Warner Bros., Inc. v. Gay Toys, Inc., 724 F.2d 327 (2d Cir. 1983)..... 21

Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472 (9th Cir. 1969), aff'g, 304 F.Supp. 1193 (N.D. Ca. 1969)..... 21

Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 29 A. 303 (1894)..... 22

Zukowski v. Dunton, 560 F.2d 30 (4th Cir. 1981)..... 20

OTHER AUTHORITIES

W. Defunia, Handbook on Modern Equity..... 20

Getman, Goldberg and Herman, Union Representation Elections: Law and Reality, 154 (1976)..... 29

STATUTES

29 U.S.C. § 157..... 2

29 U.S.C. § 159..... 2

29 U.S.C. § 160(f).....passim

IN THE
SUPREME COURT OF THE UNITED STATES

KOONS FORD OF ANNAPOLIS, INC.

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
and DISTRICT 65, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA,

Respondents.

No. 87-1305

BRIEF OF AMICUS CURIAE CENTER ON NATIONAL LABOR POLICY, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

I. INTEREST OF AMICUS

The Center on National Labor Policy, Inc. ("Center") is a public interest legal foundation chartered to provide legal assistance to individuals whose statutory and constitutional rights in the labor arena have been violated by powerful, organized interests such as labor unions and governmental entities.

A continuing subject of concern for the Center has been the interference with employee voting rights regularly committed by the National Labor Relations Board ("NLRB" or "Board"). The practice underlying the instant case is the issuance of a bargaining order which instructs an employer to bargain with a union even though the union is unable to demonstrate by secret ballot election that it has the support of a majority of the employees in the bargaining unit. See NLRB v. Gissell Packing Co., 395 U.S. 575 (1969). The Center believes that this administrative practice plainly destroys the voting rights of employees under sections seven and nine of the National Labor Relations Act, 29 U.S.C. §§ 157, 159. Conair Corp., 261 N.L.R.B. 1189, 1199 (1982).

Among its objectives, the Center is concerned about the adverse impact of

pressure groups on the civil rights of the public, consumers, taxpayers, and workers. In the Center's long-term representation of employee interests, it has found that private pressure groups, such as organized labor groups, have a history of significant impact on the rights of the public, consumers, taxpayers, and workers. As this Court recognized in Connell Construction Co. v. Plumbers and Steamfitters, Local No. 100, 421 U.S. 616, 625 (1975), union pressure "could result in significant adverse effects on the market and on consumers...."

The Center, as a public-interest organization, believes that the individual rights of consumers, taxpayers, workers, and public citizens are paramount to the collective rights of private organizations such as labor unions. Briefs amicus curiae have been filed by

the Center advocating the validity of this public policy interest in other cases before the Court, including, Breen v. ILGWU, No. 83-1791; Archie E. Brown v. FEC, No. 81-1905; Larry V. Muko, Inc. v. NLRB, No. 80-1798; Donald Schriver, et al. v. Pennsylvania Building and Construction Trades Council, No. 80-1257; New York Telephone Co. v. N.Y.S. Dept. of Labor, No. 77-961.

In the instant case, the Center was contacted by employees of Koons Ford of Annapolis, Inc. ("Koons Ford" or "the employer") in March, 1987 and informed that they were being victimized by an a Board bargaining order which ordered petitioner Koons Ford to bargain with respondent-intervenor District 65, United Automobile, Aerospace and Agricultural Implement Workers of America ("District 65" or "the union"), despite the fact that the overwhelming majority of

employees in the bargaining unit are opposed to representation by District 65. Fifty-three employees of Koons Ford, of approximately 90 current employees, signed forms retaining Center attorneys as their counsel to oppose the efforts of the Board and the union in the United States Court of Appeals for the Fourth Circuit and to obtain a new secret ballot election to select a collective bargaining representative. Because these employees were concerned that their names and addresses not be revealed to the union they requested that their interests be represented to the Court through the amicus curiae brief of the Center on National Labor Policy, Inc.[1]

The accompanying argument urges this

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[1]An affidavit with respect to these matters was filed by counsel with the United States Court of Appeals contemporaneously with the Center's motion for leave to file a brief amicus curiae.

Court to grant the petition of Koons Ford, to reverse the judgment of the United States Court of Appeals for the Fourth Circuit, and remand the case back to it so that the court of appeals considers Koons Ford's petition for review under § 10(f) of the NLRA, 29 U.S.C. § 160(f), on the merits.

The parties to the instant case are primarily focusing on the important administrative and judicial review issues under the National Labor Relations Act. Equally important, however, is the underlying substantive claim made by Petitioner and dismissed by the Fourth Circuit--that enumerated public policy interests invoked by the judicially, sua sponte, may vitiate express statutory rights to associate.

The Center is deeply concerned that if this Court permits the lower federal courts to read the equitable doctrine of

unclean hands into the settlement of labor disputes, the important public interest in resolving disputes quickly and inexpensively will evaporate.

The Center on National Labor Policy can thus bring to this case a diverse perspective not presently represented. Therefore, the Center's participation will assist the Court in obtaining full consideration of the public-interest issues.

II. ISSUE PRESENTED

Whether the court of appeals erred in determining that it was free to ascertain the equitable stain of "unclean hands," from a stipulated settlement agreement made with the Board in another matter, to deny a petition for review of a bargaining order under section 10(f) of the National Labor Relations Act to review.

III. SUMMARY OF ARGUMENT

The Center on National Labor Policy is deeply concerned that the decision of the court of appeals holding it permissible to inquire into the merits of settlements stipulations with the National Labor Relations Board, outside the judicial review procedure of § 10(f) of the National Labor Relations Act, will deter the voluntary entry of these agreements. The impact on the administration of the Act will be undercut and threatened if charged parties are considered "guilty" by the federal courts because of them.

The decision also runs contrary to the express understanding of the private parties and the Board concerning the meaning of settlement. The court's decision is contrary to well-established Board caselaw.

Finally, the equitable maxim of

"unclean hands" is reserved for controversies involving the same transaction or subject matter before the court. This was not the case here. Moreover, the maxim is improperly used when it would preserve a violation of a statutory policy. Here, the issue was whether the Board properly issued a Gissell bargaining order. Sections 7 and 9 of the National Labor Relations Act expressly preserve employee freedom of association and the right to vote. The court's decision to use the maxim in these circumstances improperly impairs these important statutory interests.

IV. THE JUDICIAL IMPLICATION OF GUILT ON THE BASIS OF NLRB SETTLEMENT AGREEMENTS IS CONTRARY TO THE NLRA

Until the decision of the Fourth Circuit in the instant case, it has been well settled and black letter law that "[a] settlement agreement does not amount

to a finding or admission that [a] respondent has committed an unfair labor practice." NLRB v. Bangor Plastics, Inc., 392 F.2d 772 (6th Cir. 1967). The Fourth Circuit determined that upon a review of its own judicial record concerning Koons Ford's settlement of unfair labor practices filed between December 1985 and May 1986, "[i]t is obvious that Koons Ford cannot meet the 'clean hands' requirement as a condition for objecting to the bargaining order in this case. It would be, therefore, a waste of judicial time to remand this cause to the Board to consider the 'clean hands' issue." (A-6).[2]

As this Court noted early in the administration of the NLRA, "the Board has from the very beginning encouraged

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[2]"A" references are to the Appendix to Petition for Writ of Certiorari order filed by petitioner.

compromises and settlements. The purpose of such attempted settlements has been to end labor disputes, and so far as possible to extinguish all the elements giving rise to them." Wallace Corp. v. NLRB, 323 U.S. at 253-54 (1944). This important public policy of reaching voluntary settlements ensures efficient use of Board resources and encourages prompt adherence to the statutory procedures and protections of the Act. See U.S. Contractors v. NLRB, 697 F.2d 692 (5th Cir. 1983). Settlement agreements, however, do preclude the Board from relitigating any aspect of presettlement conduct unless subsequent events demonstrate the settlement agreement has failed to accomplish its purpose. Id.; Wallace Corp., 323 U.S. at 254 (this is fair to "all concerned").

In NLRB v. UFCW, Local 23, 108 S.Ct. 413 (1987), the Court recently determined

that informal settlements made by the Board's General Counsel are unreviewable under § 10(f) of the NLRA and the Administrative Procedure Act. In no uncertain terms, the Court determined that "judicial review through the APA of the General Counsel's settlement determinations would run directly counter to the structure of the NLRA" Id. at 425. The Court indicated that under the statutory procedure established in NLRA § 10(f), judicial review of final orders, consent decrees, or settlements could be "fairly read" into the statute.

There is a clear similarity between the Fourth Circuit's inquiry into the merits of the settlement agreement in the instant case under the auspices of the "clean hands"[3] doctrine and APA judicial

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[3] "[H]e who comes into equity must come with clean hands." Precision Instr. Mfg. Co. v. Automotive Maint. & Mech. Co., 324 U.S. 806, 814 (1945).

review of Board decisions implemented outside the statutory procedure of the NLRA. The Court reasoned that any method of judicial review outside the formal § 10(f) process must be withheld.

> Finally, APA review of these settlements would inevitably require the federal courts, in the first adjudicatory instance, to examine the merits of unfair labor practice charges. However, Congress has made plain its unequivocal desire that, absent statutory direction to the contrary, such examinations be made first by the Board, or not at all. At least in the context of this statute, we are left with no doubt that Congress intended the right of judicial review on the merits of an unfair labor practice charge to be had only through the express provisions of the NLRA.

108 S.Ct. at 426

In the present case, the matters comprising the settlement case were presented, completed, and closed by the court of appeals before its Judgment at bar was issued. Consequently, the oppor-

tunity to contest the stipulated settlement by any aggrieved person or even by the court of appeals under § 10(f), if the agreement was determined unfair or improper, had passed.

In fact, the court of appeals issued its Judgment approving the settlement stipulation after it had been informed at oral argument of the "stain" by the Board's appellate counsel.[4] The court of appeals had a clear opportunity to consolidate the cases before the same panel of judges under Fed.R.App.P. 3(b). Under the procedure of § 10(f), it was empowered to determine the merits of the underlying unfair labor practices involved in the settlement through

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[4]Oral argument in this case was held on June 3, 1987, before Circuit Judges Russell, Widener and Chief Judge Winter. (A-1). The Settlement Stipulation was approved by the identical panel of Circuit Judges three days later on August 6, 1987. (A-28).

consolidation and thereby validate any concern it had about "unclean hands." Rather than doing so, the court of appeals approved the settlement without reservation and then five months later, affirmed the order in the instant case.

Because the Board did not determine the merits of the unfair labor practice charges alleged by the charging party and expressly agreed and understood "that the Stipulation did not admit a violation of the Act," (A-13), the court of appeals' "review" of the Stipulation is contrary to the "express provisions of the NLRA" -- that all review of unfair labor practices in any case be taken under the process of § 10(f) for that case.

The Fourth Circuit's new rule of review also runs contrary to the Board's established and well-known position with regard to the expected effect given to settlement agreements. In Cambridge Taxi

Co., 260 N.L.R.B. No. 119, 109 L.R.R.M. 1241, 1242 (1982), the Board states:

> We have consistently held that a settlement agreement disposes of all issues involving presettlement conduct of the parties, unless prior violations of the Act were either unknown to the General Counsel and not readily discoverable by investigation, or specifically reserved from the settlement agreement by the mutual understanding of the parties.

In Cambridge Taxi Co., the Board granted a motion for summary judgment to the employer concerning all outstanding charges filed prior to the settlement. In E.S.I. Meats, Inc., 270 N.L.R.B. No. 212, 117 L.R.R.M. 1065, 1066 (1984), the Board again held that all presettlement conduct of a charged party are disposed of by the execution of a settlement agreement. Consequently, a settlement agreement is expected to dispose of all issues involving presettlement conduct of the parties. This understanding by all

persons in the employment community encourages the expeditious resolution of alleged labor disputes.

Amicus curiae agrees with petitioner Koons Ford that if the federal courts begin viewing these agreements, especially ones with nonadmission clauses, as evidence in which to summarily dispose of meritorious petitions for review under NLRA section 10(f) in separate cases (in both place and time), a fundamental change has occurred which will seriously undercut future incentives for conciliation.

In the instant case, the employer's objectionable activities leading to the bargaining order occurred in the Winter of 1982. Four years later, the alleged unfair labor practice activities leading to settlement with the Board (and concurred in by the union) occurred. Two years later, the Fourth Circuit linked

the two incidents together to deny petitioner Koons Ford the statutory opportunity under 29 U.S.C. § 160(f) to contest the sweeping bargaining order against it and upon its employees.

Even the Fourth Circuit notes that its "equitable" undertaking was not in the record for review before it, that the Board had not considered these interim facts previously in its Decision and Order to petitioner, and that the issue was not briefed by the parties to the § 10(f) petition for review (i.e., the Board, Koons Ford, or union). (A-6). Rather, the issue arose only by the improper reference of Board appellate counsel at oral argument. (A-6).

Even at oral argument, the court of appeals was wary of receiving the representations at such an advanced stage in the case. But, importantly and improperly, the court of appeals never

requested the formal position of all the parties concerning any effect the settlement agreement and stipulation should have, even though the employer, union, and the Board all voluntarily signed the settlement agreement and were available parties before the court who could be interrogatoried.

To prevent a grave injustice to the parties and an obvious injury to policy interests of the Act that encourage voluntary and prompt settlement of labor disputes, certiorari must be granted and the court of appeal's Order reversed.

V. THE "CLEAN HANDS" MAXIM CANNOT BE APPLIED TO MATTERS OUTSIDE THE UNIQUE CONTROVERSY AT ISSUE BETWEEN THE LITIGANTS AT BAR

The United States Court of Appeals for the Fourth Circuit, as well as the Board's appellate counsel appearing at oral argument, deemed it proper to ascertain matters outside the stipulated

record of the case and the immediate controversy before it to deny the petition for review under NLRA § 10(f), 29 U.S.C. § 160(f). However, in invoking the equitable doctrine of "unclean hands," the Fourth Circuit actually departed from the established caveat to its application, viz., that the inequitable or wrongful conduct must be related to the same transaction or the subject matter in dispute before the court. See Hoehn v. Crews, 144 F.2d 665, 672 (10th Cir. 1944), aff'd sub nom., Garber v. Crews, 324 U.S. 200 (1945); W. DeFuniak, Handbook on Modern Equity, 39 (1956).

American state and federal courts are in considerable agreement that the "unclean hands" maxim must be connected to the actual dispute before the court. Zukowski v. Dunton, 560 F.2d 30, 35 (4th Cir. 1981) (business deals between the parties involving other ventures are not

sufficiently related to deny recovery in equity); Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472, 478 (9th Cir. 1969), aff'g, 304 F.Supp. 1193, 1201 (N.D. Ca. 1969). The defense "applies only with respect to the right in suit." Warner Bros., Inc. v. Gay Toys, Inc., 724 F.2d 327, 374 (2d Cir. 1983).

In Bias v. Bias, 109 W.Va. 621, 155 S.E. 898, 899 (1930), the court stated, "[i]t is settled that the bar of the unclean hands rule is raised only because of conduct connected with the particular transaction sought to have redressed." The same reason was posited in Lyman v. Lyman, 90 Conn. 399, 97 A. 312, 314 (1916), and the policy not to deny relief in equity explained:

> The familiar maxim that he who comes into equity must come with clean hands is not used to convey the idea that no person is permitted to invoke the aid

> of a court of equity whose life and conduct has not been above reproach, nor does it mean,... that a litigant to obtain relief in equity must have been without fault in all his dealings with or conduct towards the party against who the relief is asked.

Because of the nature of change in life as well as business, the maxim "only applies to the particular transaction under consideration, for the court will not go outside of the case for the purpose of examining the conduct of the complaint in other matters or questioning his general character for fair dealing." Id. Consequently, unless the person seeking equity "requires the aid of the illegal transaction to make out his case," no bar to equity is established. Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 128, 29 A. 303, 311 (1894).[5]

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[5]The complained of conduct must also involve the same parties before the court. "Relief is not to be denied (continued...)

Here, the Fourth Circuit also applied the maxim for the first time at the close of the case. The maxim, however, cannot be raised by a party for the first time in the appellate court. Mosley v. Magnolia Petroleum Co., 45 N.M. 230, 114 P.2d 740, 756 (1940). To do so, the party so charged would be itself inequitably treated, especially where the appellate record was agreed to by the parties. See Nishman v. DeMarco, 479

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[5](...continued)
because of general iniquitous conduct on the part of the complainant or because of the latter's wrongdoing in the course of a transaction between him and a third person." United Board & Carton Co. v. Britting, 61 N.J. Super. 340, 160 A.2d 660, 663 (App. Div. 1960). The Fourth Circuit noted that there was an unresolved question of fact concerning the new ownership and management of Koons Ford "for purposes of a Gissell bargaining order." (A-5 n.1). The Court did not recognize that a successor corporation is not denied equity on account of acts of its predecessor, Britting, 160 A.2d at 663, although it will be bound in matters at law by those acts. Vulcan Detinning Co. v. American Can Co., 72 N.J.Eq. 397, 67 A. 339, 341 (1907).

N.Y.S.2d 185, 468 N.E.2d 23 (1984). Yet, the Fourth Circuit and the Board's appellate counsel chose to disregard the surprise effect their post-argument action would have on petitioner and its employees, by not disclosing earlier that the case would turn on facts not in the record or previously briefed to the court.

In the case at bar, Koons Ford took steps to eradicate the existence of unproven unfair labor practices, as encouraged by the statutory policy in the National Labor Relations Act. See Wallace Corp. v. NLRB, 323 U.S. 253, 254 (1944). The court of appeals applied no credit to Koons Ford for having done so. Yet, having taken these steps, courts in equity do not thereafter punish a litigant. "While the fact that a party seeking equity does not come with clean hands deprives such party of the right to

any relief, nevertheless, if such party purges himself of former unconscionable and wrongful conduct by adequate and effective renunciation and repudiation thereof, his right to relief will be restored." Dickerson v. Murfield, 173 Or. 662, 147 P.2d 194, 197 (1944). "Thus while 'equity does not demand that its suitors shall have led blameless lives . . ., as to other matters,' it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue." Precision Instrument Mfg. Co. v. Automotive Mach. Co., 324 U.S. 806, 814 (1945) (citation omitted).

Koons Ford eradicated the alleged unlawful effects by completing the steps agreed to with the Board in the voluntary settlement agreement. As the Board's Regional Director stated in recommending approval of the agreement, "[t]he

settlement provides almost the complete relief to which the Charging Party would be entitled should a Decision and Order issue, will result in the accelerated restoration of harmony between Respondent and the Charging Party, and will conserve the resources of all parties and the Board in reviewing a transcript of in excess of 4100 pages and the preparation of briefs and decisions." (A-16).

In these circumstances, if Koons Ford's unproven "guilt" can be accepted as true for purposes of equity, Koons Ford's entry into settlement, settlement and execution thereof has removed any taint barring relief in this matter. The Board and union "expressly understood that by entering this Stipulation, Respondent does not admit it violated the National Labor Relations Act, as amended." (A-13). Neither of these two respondent parties can show that their

interests are thereby prejudiced. "Without such a showing, the doctrine of clean hands cannot be utilized to preclude relief to [plaintiffs]." Collens v. New Canaan Water Co., 155 Conn. 477, 234 A.2d 825, 833 (1967).

As this Court stated in Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 387 (1944), "[t]he maxim that he who comes into equity must come with clean hands is not applied by way of punishment for an unclean litigant but 'upon considerations that make for the advancement of right and justice.'" Accordingly, "[i]t is not a rigid formula" to be applied regardless of other interests involved in the case. Id. In Yellow Cab, the Court indicated that the maxim cannot be used where the result is contrary to a statute.

In Perma-Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138 (1968), the Court enunciated its

concern that "common-law barriers to relief where a private suit serves important public purposes" should not be applied by the federal courts. Hence, injunctions in private antitrust lawsuits will not be denied to an "unclean" plaintiff because of the "overriding public policy in favor of competition." Id. at 139. Also Kiefer-Stewart Co. v. Joseph Seagram & Sons, 340 U.S. 211, 214 (1951); Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d at 852, 864 (5th Cir. 1979) (unclean hands on ground of obscenity is inadequate justification to bar relief in copyright suit).

In the instant case, invocation of the "unclean hands" maxim saddles the employees with a bargaining representative not of their choosing. This result is contrary to the express provision of NLRA section 7 guaranteeing workers the

right to choose their own representatives. Like Perma-Life Mufflers, the equitable nature of Koons Ford's petition for review should not be denied because there is an "overriding" and stated statutory interest in ensuring employee freedom of association.

The remedial interest of the Board in this case is substantially diminished by the fact of lapse of time from the incident leading to the bargaining order occurred, due to its own inaction, and the fact that in the secret ballot election conducted by the Board, the employees chose not to be organized by District 65 in a vote of 39 to 27. (A-47). There is "no evidence that unlawful campaigning regarded by the Board as sufficiently serious to warrant a bargaining order affects voting." Getman, Goldberg and Herman, Union Representation Elections: Law and

Reality, 154 (1976).

Accordingly, the injury to the private rights of third party employees not to associate with a union must not be denied by an equity court's evaluation of the stain of "unclean hands" involving their employer's conduct. The petition for writ of certiorari must be granted to prevent this irreparable harm to employee rights and to the finely tuned mechanism for review of unfair labor practices under NLRA § 10(f).

CONCLUSION

For the reasons stated above, amicus curiae Center on National Labor Policy, Inc., submits that the Court should issue the writ of certiorari to review the decision below and then remand the case to the court of appeals for a decision on the merits of the Board's underlying

bargaining order.

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OCTOBER TERM, 1987

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals properly enforced the bargaining order issued by the National Labor Relations Board without requiring the Board to reopen the record so that petitioner could adduce evidence of post-hearing employee turnover and changes in ownership and management.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	13
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Bandag, Inc. v. *NLRB*, 583 F.2d 765 (5th Cir. 1978)	11
Chromalloy Mining & Minerals v. *NLRB*, 620 F.2d 1120 (5th Cir. 1980)	10
Granite City Journal, 262 N.L.R.B. 1153 (1982)	11
NLRB v. *Ace Comb Co.*, 342 F.2d 841 (8th Cir. 1965)	11
NLRB v. *Air Products & Chemicals, Inc.*, 717 F.2d 141 (4th Cir. 1983)	10
NLRB v. *Eagle Material Handling, Inc.*, 558 F.2d 160 (3d Cir. 1977)	10
NLRB v. *Gissel Packing Co.*, 395 U.S. 575 (1969)	10
NLRB v. *Keystone Pretzel Bakery*, 696 F.2d 257 (3d Cir. 1982)	11
Piggly Wiggly, Tuscaloosa Div. v. *NLRB*, 705 F.2d 1537 (11th Cir. 1983)	10
SEC v. *Chenery Corp.*, 318 U.S. 80 (1943)	12

Statute:

National Labor Relations Act, 29 U.S.C. (& Supp. III) 151 *et seq.*:	
§ (8)(a)(1), 29 U.S.C. 158(a)(1)	3
§ (8)(a)(3), 29 U.S.C. 158(a)(3)	3
§ (8)(a)(5), 29 U.S.C. 158(a)(5)	3-4

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 833 F.2d 310 (Table). The decision and order of the National Labor Relations Board, including the findings and recommendations of the administrative law judge (Pet. App. A30-A45, A46-A133), are reported at 282 N.L.R.B. No. 88.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1987. A timely petition for rehearing was denied on December 11, 1987 (Pet. App. A136). The petition for a writ of certiorari was filed on February 4, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In November 1982, District 65, United Automobile, Aerospace and Agricultural Implement Workers of America (the Union), began an organizational campaign among petitioner's service department employees (Pet. App. A58). By mid-December 1982, the Union had obtained authorization cards from at least 38 of the 66 unit employees (*id.* at A39). On petition by the Union, the National Labor Relations Board scheduled a representation election for January 12, 1983 (*id.* at A118).

Petitioner's officials, however, learned of the Union's organizational drive and, as a consequence, on approximately 26 occasions between mid-November 1982 and January 12, 1983, "either threatened employees with plant closure, discharge, and layoff, more onerous working conditions and stricter work rules leading to the discharge of employees, and loss of privileges and benefits; interrogated employees concerning their union sympathies and the organization campaign; or unlawfully solicited employees to campaign against the Union" (Pet. App. A34-A35; see also *id.* at A72-A95). Specifically, petitioner's President, John Koons Jr., announced to an employee whom he was interrogating about the Union that "he didn't need the dealership and he would close it down and turn it into an apartment building or an office building" (*id.* at A35, A76); moreover, he told several other employees that he did not need the dealership and "could close the doors and move to Florida and that life would go on without Koons Ford" (*id.* at A35, A75-A76). Petitioner's Service Department Manager, Ned Tomarchio, in turn told an employee that President Koons could easily close down the dealership and warned two mechanics that unionization would mean that employees could be fired or otherwise disciplined for arriving late to

work, for making unsatisfactory repairs, or for requesting additional time to complete a job (*id.* at A35-A36, A85-A88). Likewise, petitioner's Make-Ready Manager, Irv Sherbert, warned two mechanic's helpers that employees would receive more severe discipline if the Union was selected as their collective bargaining representative, with the result that employees could be fired for a single misstep (*id.* at A36, A80); he also told the two least senior employees in his department that they would be laid off in the event of unionization (*id.* at A36, A78). Tomarchino, Sherbert, and General Manager Ronald Hendrick similarly threatened small groups of employees that valued employee privileges would be taken away if the employees elected to unionize (*id.* at A36, A83, A89-A90, A91-A95). Finally, on January 6, 1983, just six days before the representation election, petitioner increased the wages of its body-shop employees—by granting their long-standing demand that their compensation formula be returned to the system that had been in effect prior to April 1982—and gave pay increases, averaging between 25 and 60 cents per hour, to 15 used car, parts, and make-ready department employees (*id.* at A36-A37, A97-A103, A107-A118).

The Union lost the January 12, 1983 election, with 27 employees voting in its favor, and 39 employees voting against it (Pet. App. A47). It then filed unfair labor practice charges and objections to the election with the Board, contending that petitioner's pre-election misconduct had precluded a fair election (*id.* at A47-A48). In response to these charges, the General Counsel issued a complaint against petitioner (*id.* at A48).

2. After a hearing, an administrative law judge (ALJ) held that, by engaging in the aforementioned acts, petitioner had violated Sections 8(a)(1), (a)(3), and (a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), (a)(3)

and (a)(5) (Pet. App. A46-A130). As a remedy, the ALJ recommended: (a) that petitioner be ordered to cease and desist from the aforementioned acts; (b) that the results of the January 12, 1983 election be set aside; and (c) that petitioner be ordered to recognize and bargain with the Union as the representative of the service department employees (*id.* at A126-A130).

In recommending that a bargaining order issue, the ALJ noted both that "[t]he applicable standard is set forth in the landmark case of *N.L.R.B.* v. *Gissel Packing Company,* 395 U.S. 575, 613-615 (1969)," and that, under this standard, a bargaining order may issue where a union has at one point enjoyed majority support and the employer's unfair labor practices have rendered the possibility of conducting a fair rerun election too slight (Pet. App. A121, A122). The ALJ then found that petitioner "ha[d] engaged in a pattern of unremedied unfair labor practices which effectively destroyed the conditions [necessary] for a free and fair election, that those conditions probably cannot and will not be restored at any time in the foreseeable future, and that therefore a bargaining order is warranted, based on the Union's majority status as of November 23 and 24" (*id.* at A123). The ALJ explained (*id.* at A123-A124 (footnotes omitted)):

> The present case presents an almost textbook example of the 'fist inside the velvet glove.' *N.L.R.B.* v. *Exchange Parts,* 375 U.S. 405, 409 (1964). [Petitioner] through its supervisory personnel repeatedly hammered home the theme that unionization would *per se* result in the loss of a wide range of privileges and benefits which were important to the employees, e.g., job security, employer assistance, access to management, hobby night, working on cars outside the job, parts discount, opportunity for schooling advance-

> ment, drinking beer after work, and the annual Christmas party. These threats for all practical purposes nullified [petitioner's] belated assertion that it would bargain in good faith. Moreover the employees were well aware that retention of some of these privileges and benefits were dependent on employer good will or other subjective or variable factors within [petitioner's] control, e.g., the extent to which the service manager might grant more time to a mechanic on a flat rate job. Therefore, it is unlikely that the posting of a Board notice (and that essentially is all that a conventional Board order could provide in this case) would offer much assurance to the employees. * * * Most serious, however, were the pay increases granted shortly before the election. In these cases, * * * [e]ssentially all the Board can do is to tell the employer not to do it again. * * * The impact of such actions, coupled with [petitioner's] unlawful threats, cannot easily be forgotten. * * *

The ALJ added (*id.* at A125) that "neither the passage of time nor employee turnover is likely to result in conditions which would allow uncoerced employee choice in a free and fair election," noting that (*id.* at A125-A126):

> [Petitioner] presented evidence that as of the close of the hearing (October 18, 1983), 24 of the 66 employees in the unit as of January 10 were no longer employed by [petitioner], and one was no longer in the unit. The evidence indicates that there is substantial turnover among [petitioner's] younger, unskilled employees, e.g., porters, helpers and make-ready employees. However the evidence also indicates that there is much greater stability at higher levels of progression, particularly among the line mechanics and those on commission. * * * These employees included

> the principal union adherents and employees who were direct targets of [petitioner's] unfair labor practices. * * *

Accordingly, the ALJ concluded that "it will be a long time before the 1982-83 election campaign is forgotten at the Company and before the effects of the Company's unlawful conduct can be dissipated" (*id.* at A126).

3. The Board affirmed the ALJ's decision and adopted, with minor modifications not material here, his recommended order (Pet. App. A30-A45). The Board noted that "[b]oth the courts and the Board have long recognized that threats of job loss (i.e., plant closure, discharge, and layoff) because of union activity are among the most flagrant interference with Section 7 rights and are more likely to destroy election conditions for a lengthier period of time than other unfair labor practices" (*id.* at A37-A38) (footnote omitted)). It then determined that "the natural and likely result of the threats found here was to reinforce the employees' fear that they would lose employment if they persisted in their union activity," particularly since "these violations were commited by Koons, the [petitioner's] top official, and two department managers of the unit employees" (*id.* at A38). The Board described the wage increases awarded to 24 unit employees six days before the election as "an equally serious violation" (*ibid.*), noting that "such conduct must, of necessity, have a strong coercive effect on the employees' freedom of choice, serving as it does to eliminate, by unlawful means and tactics, the very reason for a union's existence" (*id.* at A38-A39 (footnote omitted)), and that "[w]age increases in particular have a potential long-lasting effect, since the Board's traditional remedies do not require [petitioner] to withdraw the benefits from the employees" (*id.* at A39 (footnote omitted)). Finally, the Board found that petitioner's "careful orchestration and general campaign to

destroy employee support for the Union" resulted in a "clear dissipation of union support during the period of [petitioner's] most egregious violations" (*ibid.*) and that "the inhibitive effects of these unfair labor practices are likely to persist despite a substantial level of turnover and concomitant passage of time" (*id.* at A40).

In this latter regard, the Board noted that "a substantial portion of the turnover occurred among [petitioner's] younger less skilled employees, while many of the older more skilled employees, who were the direct targets of many of the threats, are still employed" (Pet. App. A40). Moreover, "[i]n light of the extensive and repetitive nature of the violations, in particular the threats engaged in at general department meetings," the Board was unwilling to "assume that other employees were unaffected" (*id.* at A41). It concluded that "[t]he continued presence of these employees creates a potential that the inhibitive effect of the unfair labor practices remain, preventing the possibility of a fair election" (*ibid.*). Finally, it refused to reopen the record so that petitioner might adduce evidence of post-hearing turnover in employees and changes in ownership and management, including the transfer of ownership and the presidency to Joseph Koons, finding that "the evidence sought to be adduced would not require a different result" (*id.* at A40 n.18).

4. In an unpublished per curiam opinion, the court of appeals enforced the Board's order (Pet. App. A1-A6). It noted petitioner's contention that the Board had erred by failing to reopen the record in this case to receive petitioner's evidence concerning employee turnover and changes in ownership and management (*id.* at A4). It similarly noted the Board's contention that it was "not required to reopen the record to consider post-hearing evidence of changed circumstances" and that, in any

event, it "actually *did* consider this evidence" (*id.* at A5 (emphasis in original)). But the court concluded (*ibid.*) that it did not have to resolve these issues. It noted that "a bargaining order is in the nature of an equitable remedy" (*ibid.*); that an employer who "continues to act with disdain or disregard for this country's labor laws * * * presents the most cogent possible evidence that there could not be a free and fair second election" (*ibid.*); and that "[o]nly if the employer has clean hands can there be any reason to look at changed circumstances and determine whether they should affect the enforcement of the bargaining order" (*id.* at A5-A6). It then concluded that petitioner did not have such clean hands, noting that "unfair labor practices charges had been filed against [petitioner] after the Board issued its order in this proceeding," that "[t]hese charges were disposed of by a settlement stipulation providing for the entry of a Board Order and a Court Judgment enforcing that order," and that, while "the settlement stipulation * * * did not" include an admission that petitioner had violated the statute, it did include "an extensive order requiring compliance with the Act and providing for full and immediate reinstatement, and for any loss of earnings or other benefits suffered by reason of the discharging of three specific complainants in the proceeding" (*id.* at A6).[1] Having "reviewed in this

[1] The court was referring to the unfair labor practice charges underlying the complaint that the General Counsel filed against petitioner on March 5, 1987. This complaint, which is attached as an appendix to this brief, alleged that, on August 5, 1985, petitioner held a meeting at which its then-president, Joseph Koons: (a) promised to provide employees with raises and a pension plan if they abandoned their support for the Union; (b) solicited employees to persuade other employees to abandon their support for the Union; (c) informed employees that it would be futile to support the Union; (d) informed employees that petitioner would not bargain with the Union;

appeal the record in the other proceeding between the parties," the court was certain that "[petitioner] [could not] meet the 'clean hands' requirement" (*ibid.*). Accordingly, it held that "[i]t would be * * * a waste of judicial time to remand this cause to the Board to consider the 'clean hands' issue" (*ibid.*).

(e) solicited employees to decertify the Union as their collective-bargaining representative; and (f) offered to assist employees to decertify the Union (App., *infra*, 5a-6a). The complaint also alleged that, at the same meeting, Joseph Koons threatened employees with discharge if they engaged in union activities, and that other supervisory personnel threatened employees with discharge because of their union activity during the period January 15 through January 21, 1986 (*id.* at 6a). Finally, the complaint alleged that the discharges on March 30, 1986 of three employees—Ricky Kubert, Fred Pierson, and Joseph Smith—were due, inter alia, to their activities on behalf of the Union, including testifying in the unfair labor practice proceedings in the instant case (*id.* at 4a-5a).

The complaint was settled by a stipulation in which petitioner agreed to the entry of a Board order requiring it: (a) to cease and desist from engaging in the conduct alleged to have occurred at the August 5, 1985 meeting held by Joseph Koons; (b) to cease and desist from discharging or otherwise disciplining or discriminating against its employees because of their protected activity or because "they have filed charges or given testimony under [the Act]"; and (c) to offer reinstatement and certain sums of backpay to the three discharged employees (Pet. App. A11). The settlement stipulation contained a non-admission clause stating that "by entering [into] this Stipulation, [petitioner] does not admit it violated the [Act]" (*id.* at A13). Finally, the settlement provided that petitioner was waiving all defenses to the entry of a judgment by the appropriate court of appeals enforcing the Board's order (*ibid.*).

The Board approved this settlement on May 28, 1987, and entered the agreed-upon order (Pet. App. A19-A27). The court of appeals then enforced the Board's order on August 6, 1987 (*id.* at A28-A29).

ARGUMENT

The court below reached the correct result in this case. Its decision does not conflict with any decision of this Court or of any other court of appeals. Accordingly review by this Court is not warranted.

1. In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 613-614 (1969), the Court approved issuance by the Board of bargaining orders in both "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices and also "in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." A bargaining order may therefore issue "where there is a showing that at one point the union had a majority" and "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order * * *" (*id.* at 614-615). In this case, the Board found that petitioner's unfair labor practices had dissipated a card majority and that the effects of the unfair labor practices could not be erased by traditional remedies (so that a fair election could be held). Accordingly, it is clear that a bargaining order would ordinarily be justified. See, *e.g.*, *NLRB* v. *Air Products & Chemicals, Inc.*, 717 F.2d 141, 144-147 (4th Cir. 1983); *Piggly Wiggly, Tuscaloosa Div.* v. *NLRB*, 705 F.2d 1537, 1540-1543 (11th Cir. 1983); *Chromalloy Mining & Minerals* v. *NLRB*, 620 F.2d 1120, 1130 (5th Cir. 1980); *NLRB* v. *Eagle Material Handling, Inc.*, 558 F.2d 160, 167-169 (3d Cir. 1977).

2. In the court below, petitioner contended (Pet. Br. 15-28) that a bargaining order was not justified because

of post-hearing turnover in employees and changes in management and ownership and that the Board had erred in issuing the bargaining order without reopening the record so that petitioner could adduce evidence of these post-hearing events. But, as the Board noted (Pet. App. A40 n.18), "the evidence sought to be adduced would not require a different result." "[A] substantial portion of the turnover occurred among [petitioner's] younger less skilled employees, while many of the older more skilled employees, who were the direct targets of many of the threats, are still employed"; "[t]he continued presence of these [and other] employees create[d] a potential that the inhibitive effect of the unfair labor practices [would] remain, preventing the possibility of a fair election" (*id.* at A41 (footnote omitted)). Moreover, the only significant change in management and ownership occurred when Joseph Koons succeeded his brother, John Koons, Jr., as the dealership's owner and president, and Joseph Koons did not disavow the prior coercive acts of petitioner's officials or communicate to the employees in the bargaining unit that he had taken steps to assure that their rights would be respected in the future. See C.A. App. 77-79, 82-85, 117-140. Accordingly, it was reasonable for the Board to conclude that, notwithstanding the alleged post-hearing events, a fair election was not possible and a bargaining order should still issue. See *NLRB* v. *Keystone Pretzel Bakery*, 696 F.2d 257, 265 (3d Cir. 1982); *Bandag, Inc.* v. *NLRB*, 583 F.2d 765, 772 (5th Cir. 1978); *NLRB* v. *Ace Comb Co.*, 342 F.2d 841, 844 (8th Cir. 1965); *Granite City Journal*, 262 N.L.R.B. 1153, 1158 (1982).

3. The court below rested its judgment, however, on the alternative ground that petitioner did not have "clean hands" warranting reopening the record to take evidence of post-hearing events, because in fact unfair labor practice charges based on alleged post-hearing events had been

filed against petitioner and settled by an order approved by the Board and enforced by the court. Even though the results below can stand on the grounds discussed by the Board, petitioner contends (Pet. 8-17) that this Court's review is warranted, because in relying on the settlement stipulation the court of appeals violated the established principle that a settlement agreement with a "nonadmission clause" may not be used to "impute guilt" to a party entering into that settlement. But the court below did not use the settlement agreement to "impute guilt" to petitioner. It merely concluded that the existence of a settlement, and the unfair labor practice charges underlying it, made it appropriate not to require a new evidentiary hearing to enable petitioner to show that post-hearing events had made a fair election possible. That conclusion was eminently sensible: the settlement did not insulate the post-hearing events from any possible consideration in connection with determining the appropriateness of a bargaining order. Petitioner argued below (Pet. Br. 26, 27) that a fair election could be held because "[t]he record does not reflect that [petitioner] has committed an[y] unfair labor practices since the accession of Joseph Koons" and is "devoid of any evidence tending to reveal any anti-union animus on the part of [petitioner's] current management." The court of appeals was not obliged to take that claim at face value when the settlement was a matter of record and the court knew that at any reopened hearing the claim of no "evidence * * * of anti-union animus" would be swiftly dashed.

4. Petitioner also suggests (Pet. 9, 18-20) that the decision below violates the principle of administrative law enunciated by this Court in *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943), to wit, that the validity of agency action ordinarily must be judged solely by the grounds invoked by the agency. But the court here was not affirming

an exercise of agency discretion on grounds other than those that supporting the actual exercise of that discretion. It merely concluded that it was "obvious," on the basis of information it had before it, that further proceedings would be "a waste of judicial time" (Pet. App. A6). At worst, it might be said that the court gave excessive weight to the existence of post-hearing charges in concluding that a reopened hearing would be futile. That judgment, highly specific to this case, does not warrant this Court's review in this case, where the Board's conclusion was amply justified by the reasons it itself gave, and where the court of appeals' opinion is unpublished.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1988

APPENDIX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
REGION 5

Cases 5-CA-17683, 5-CA-17917, 5-CA-17933

KOONS FORD OF ANNAPOLIS, INC.

and

DISTRICT 65, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA

AMENDED ORDER CONSOLIDATING CASES, AMENDED COMPLAINT, THIRD CONSOLIDATED COMPLAINT AND NOTICE OF HEARING

Upon a charge filed on December 11, 1985, in Case 5-CA-17683, by District 65, United Automobile, Aerospace and Agricultural Implement Workers of America, herein called the Union, and upon a charge filed on January 21, 1986, amended on February 12, 1986, in Case 5-CA-17770, by the Union, an Order Consolidating Cases, Amended Complaint, Consolidated Complaint and Notice of Hearing issued on March 28, 1986, against Koons Ford of Annapolis, Inc., herein called Respondent; and upon a charge filed on March 17, 1986, amended on May 5, 1986, in Case 5-CA-17917, by the Union, and upon a charge filed on March 21, 1986, amended on May 5, 1986, in Case 5-CA-17933, by the Union, an Order Consolidating Cases, Amended Consolidated Complaint, Second Consolidated Complaint and Notice of Hearing issued on May 23, 1986, against Respondent; and upon an

Order issued March 2, 1987, by the Administrative Law Judge, severing Case 5-CA-17770 from the Order Consolidating Cases, Amended Consolidated Complaint, Second Consolidated Complaint and Notice of Hearing dated May 23, 1986, and granting leave to amend the complaint in Cases 5-CA-17683, 5-CA-17917 and 5-CA-17933; the General Counsel for the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned, pursuant to Section 10(b) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et seq., herein called the Act, and Section 102.15 and 102.17 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Amended Order Consolidating Cases, Amended Complaint, Third Consolidated Complaint and Notice of Hearing, and alleges as follows:

1. (a) The charge in Case 5-CA-17683 was filed by the Union on December 11, 1985, and a copy thereof was served by certified mail on Respondent on the same date.

(b) The original charge in Case 5-CA-17917 was filed by the Union on March 17, 1986, and a copy thereof was served by certified mail on Respondent on March 18, 1986.

(c) The first amended charge in Case 5-CA-17917 was filed by the Union on May 5, 1986, and a copy thereof was served by certified mail on Respondent on May 8, 1986.

(d) The original charge in Case 5-CA-17933 was filed by the Union on March 21, 1986, and a copy thereof was served by certified mail on Respondent on March 24, 1986.

(e) The first amended charge in Case 5-CA-17933 was filed by the Union on May 5, 1986, and a copy thereof was served by certified mail on Respondent on May 8, 1986.

2. (a) At all times material herein, Respondent, a Maryland corporation with an office and place of business in Annapolis, Maryland, herein called Respondent's facility, has been engaged in the retail sale and service of automobiles.

(b) During the preceding twelve months, a representative period, Respondent, in the course and conduct of its business operations described above in paragraph 2(a), derived gross revenues in excess of $500,000.

(c) During the period of time described above in paragraph 2(b), Respondent, in the course and conduct of its business operations described above in paragraph 2(a), purchased and received at its facility goods and materials valued in excess of $5,000 directly from points located outside the State of Maryland.

(d) Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

3. The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

4. At all times material herein, the following named persons have occupied the positions set forth opposite their respective names, and are now, and have been, supervisors of Respondent within the meaning of Section 2(11) of the Act, and agents of Respondent within the meaning of Section 2(13) of the Act:

Arthur W. Dawson	– Shop Foreman
Ronald L. Hendrick	– General Manager
Joseph R. Koons	– President
John L. Moore	– Service Manager
Henry D. Sparrow	– General Parts and Service Director

5. In or around February 1986, Respondent's employee, Joseph Smith, contacted the Maryland Occupational Safety and Health Administration (M.O.S.H.A.) regarding alleged safety problems at Respondent's facility, and on or about March 5 and March 19, 1986, Respondent's employees, Joseph Smith, Fred Pierson and Ricky Kubert, participated in a M.O.S.H.A. investigation and inspection at Respondent's facility.

6. On or about the dates listed below, Respondent, acting through Henry D. Sparrow, issued letters of warning to the employees named below:

Ricky Kubert – February 19, 1986, March 14, 1986, and March 20, 1986
Fred Pierson – March 14, 1986 and March 20, 1986
Joseph Smith – February 12, 1986, March 14, 1986, and March 20, 1986

7. On or about March 20, 1986, Respondent terminated its employees Ricky Kubert, Fred Pierson and Joseph Smith.

8. Respondent engaged in the conduct described above in paragraphs 6 and 7 because the employees named therein joined, supported or assisted the Union, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

9. Respondent engaged in the conduct described above in paragraphs 6 and 7 because the employees named therein gave testimony to the Board in Cases 5-CA-15050, 5-RC-11899, 5-CA-17683 and 5-CA-17917.

10. Respondent issued the warnings of March 14 and March 20, 1986, described above in paragraph 6, and engaged in the conduct described above in paragraph 7, because the employees named therein engaged in the

activity described above in paragraph 5, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

11. At or around noon on or about August 5, 1985, Respondent, acting though Joseph Koons in the upstairs conference room at Respondent's facility:

(a) promised employees raises and a pension plan if they abandoned support for the Union as their collective-bargaining representative;

(b) solicited employees to persuade other employees to abandon support for the Union as their collective-bargaining representative;

(c) informed employees that it would be futile to support the Union as their collective-bargaining representative;

(d) informed employees that it would not bargain with the Union as their collective-bargaining representative;

(e) solicited employees to decertify the Union as their collective-bargaining representative;

(f) offered to assist employees to decertify the Union as their collective-bargaining representative.

12. At or around 4:30 p.m. on or about August 5, 1985, Respondent, acting through Joseph Koons in the upstairs conference room at its facility, threatened employees with discharge if they engaged in protected concerted activities.

13. In or around the period between January 15 and January 21, 1986, the exact date being presently unknown to the undersigned, Respondent, acting through Arthur Dawson and Henry D. Sparrow, at its facility, threatened employees with discharge because of their activities in support of the Union by telling employees that Respondent wanted to get rid of all the troublemakers in the shop.

14. By the acts and conduct described above in paragraphs 6, 7, 10, 11, 12 and 13, and by each of said acts, Respondent has interfered with, restrained and coerced, and is interfering with, restraining and coercing, employees in the exercise of the rights guaranteed in Section 7 of the Act, and Respondent thereby has been engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

15. By the acts and conduct described above in paragraphs 6, 7 and 8, and by each of said acts, Respondent has discriminated, and is discriminating, in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, and Respondent thereby has been engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

16. By the acts and conduct described above in paragraphs 6, 7 and 9, and by each of said acts, Respondent has discriminated, and is discriminating, against employees for giving testimony under the Act, and Respondent thereby has been engaging in unfair labor practices within the meaning of Section 8(a)(1) and (4) of the Act.

17. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

VISITORIAL CLAUSE

WHEREFORE, as part of the remedy for the unfair labor practices alleged above in paragraphs 6 through 16, the General Counsel seeks an order providing that Respondent:

> Notify the Regional Director for Region 5, in writing, within 10 days from the date of this Order, what steps

have been taken to comply therewith. For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized representatives, may obtain discovery from Respondent, its officers, agents, successors or assigns, or any other person having knowledge concerning any compliance matter, in the manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States Court of Appeals enforcing this Order and may be had upon any matter reasonably related to compliance with this Order, as enforced by the Court.

The General Counsel further prays for such other relief as may be just and proper to remedy the unfair labor practices herein alleged.

PLEASE TAKE NOTICE that on a date to be determined, a hearing will be conducted in the Hearing Room, 4th Floor, Room 4200, Candler Building, 109 Market Place, Baltimore, Maryland, before a duly designated administrative law judge of the National Labor Relations Board on the allegations set forth in the above amended consolidated complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, Respondent shall file with the undersigned, acting in this matter as an agent of the National Labor Relations Board, an original and four (4) copies of an answer to said amended consolidated complaint within fourteen (14) days from the service thereof, and that, unless Respondent does so, all of the allegations in the amended consolidated complaint shall be deemed to be admitted to be true and shall be so found by the Board. You

are also notified that, pursuant to said Rules and Regulations, Respondent shall serve a copy of its answer on each of the parties.

Form NLRB-4668, Statement of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practices Cases, is attached.

Dated at Baltimore, Maryland this 5th day of March 1987.

(SEAL)

/s/ Louis J. D'Amico

LOUIS J. D'AMICO, Regional Director
National Labor Relations Board,
Region 5
Candler Building, 4th Floor
109 Market Place
Baltimore, Maryland 21202

Attachment

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60347

Supreme Court, U.S.
FILED
APR 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

KOONS FORD OF ANNAPOLIS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

DISTRICT 65, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY ARGUMENT	1
I. Introduction	1
II. The Supreme Court Should Not Accede To The Board's Request To Cure The Fourth Circuit's Failure To Engage In The Required Substantial Evidence Review Of The Agency Decision	2
III. The Fourth Circuit's Sole Rationale For Enforcement Of The Bargaining Order Conflicts Directly With Decisions Of Other Courts Of Appeals And Constitutes A Radical Departure From The Accepted And Usual Course Of Judicial Review	4
IV. The Fourth Circuit Improperly Enforced The Bargaining Order Solely On Grounds Never Considered Or Invoked By The Board	8
CONCLUSION	10

TABLE OF AUTHORITIES

COURT DECISIONS — Page

American Textile Manufacturers Institute, Inc. v. Donovan, 452 U.S. 490 (1981) 4
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 8
Commissioner of Internal Revenue v. McCoy, 108 S. Ct. 217 (1987) 9
Conair Corp. v. NLRB, 721 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984) 3
Federal Power Commission v. Texaco, Inc., 417 U.S. 380 (1974) 8
FTC v. Standard Oil Co., 355 U.S. 396 (1958) 4
Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985) 8
Gulf States Utilities Co. v. Federal Power Commission, 411 U.S. 747 (1973) 8
Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29 (1983) 8
NLRB v. Bangor Plastics, Inc., 392 F.2d 772 (6th Cir. 1967) 4
NLRB v. Food Store Employees, 417 U.S. 1 (1974) 8
NLRB v. Pittsburgh Steamship Co., 340 U.S. 498 (1951) 4
SEC v. Chenery Corp., 318 U.S. 80 (1943) 8
Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 3
W.B. Johnston Grain Co. v. NLRB, 365 F.2d 582 (10th Cir. 1966) 5

ADMINISTRATIVE DECISIONS

Gourmet Foods, Inc., 270 N.L.R.B. 578, 116 L.R.R.M. 1105 (1984) 3
Mason & Hanger-Silas Mason Co., 167 N.L.R.B. 894, 63 L.R.R.M. 1208 (1967), *enf'd*, 405 F.2d 1 (5th Cir. 1968) 7
Poray, Inc., 143 N.L.R.B. 617, 53 L.R.R.M. 1373 (1963), *petition denied*, 337 F.2d 114 (D.C. Cir. 1964) 7

TABLE OF AUTHORITIES—Continued

Page

Southwest Chevrolet Corp., 194 N.L.R.B. 975, 79 L.R.R.M. 1156, *enf'd*, 82 L.R.R.M. 2620 (7th Cir. 1972) 7

STATUTES AND RULES

National Labor Relations Act, 29 U.S.C. § 151, *et seq.*:

29 U.S.C. § 160(b) 5
29 U.S.C. § 160(c) 5
29 U.S.C. § 160(e) 5

Federal Rules of Evidence, 28 U.S.C.A.

Rule 408 5
Rule 1101(a) 5

Circuit Court Rules

Fourth Circuit I.O.P. 36.5 9
Sixth Circuit R. 24(b) 9
Seventh Circuit R. 28(d) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1305

KOONS FORD OF ANNAPOLIS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

DISTRICT 65, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

REPLY ARGUMENT

I. Introduction

Petitioner Koons Ford of Annapolis, Inc. ("Koons Ford"), demonstrated in its petition for writ of certiorari that this Court's review of the decision of the United States Court of Appeals for the Fourth Circuit is warranted because the lower Court's sole rationale for enforcement of the bargaining order is in direct conflict with rulings in other courts of appeals and constitutes an extreme departure from the accepted and usual course of judicial review. Respondent National Labor Relations Board ("NLRB" or "Board") has filed an opposing brief

which attempts to distract this Court's attention from the important issues presented for review. The Board engages initially in a semantical characterization of the Fourth Circuit's ruling, but ultimately collapses with a final plea that, notwithstanding the lower Court having given "excessive weight to the existence of post-hearing charges[,]" the "*Board's* conclusion was amply justified by the reasons *it itself* gave. . . ." *See* Brief For The National Labor Relations Board In Opposition at 13 ("NLRB Brief") (emphasis added). Koons Ford files this reply to address the arguments raised by the Board.

II. The Supreme Court Should Not Accede To The Board's Request To Cure The Fourth Circuit's Failure To Engage In The Required Substantial Evidence Review Of The Agency Decision

The Board urges this Court to deny Koons Ford's petition because the allegedly "correct result" in this case—enforcement of the bargaining order—is supported by substantial evidence. *See* NLRB Brief at 10-13. The Fourth Circuit, however, failed to afford Koons Ford the required substantial evidence review of the Board's bargaining order decision. The lower Court's only observations concerning the adequacy of the NLRB's decision were that the Board had not addressed the turnover in ownership or management and that such "alleged changes . . . involve[d] unresolved questions of fact." (A-5 and n.1). The lower Court refused to rule on Koons Ford's central assertion that the Board had an obligation to consider these issues in the context of determining the appropriateness of a bargaining order (A-4-5), and failed to examine the adequacy of those bases challenged by Koons Ford that the Board did propound for the issuance of such order.[1]

[1] Koons Ford appealed and mounted major substantial evidence attacks on the Board's findings concerning (1) the union majority based on authorization cards, and (2) the conferral of economic benefits for unlawful purposes. *See* Brief for Petitioner Koons Ford of Annapolis, Inc. at 28-50, *Koons Ford of Annapolis, Inc. v.*

The Board now urges this Court to deny Koons Ford's petition on the theory that, although the Court of Appeals "rested its judgment . . . on the alternative ground that petitioner did not have 'clean hands'[,] . . . the results below can stand on the grounds discussed by the Board. . . ." *See* NLRB Brief at 10-11. In furtherance of this argument, the Board devotes virtually all of its opposition brief to a "substantial evidence" review of the agency's decision and its rationale for issuing a bargaining order.[2]

The Board's argument constitutes nothing less than a request that this Court dispose of Koons Ford's petition for writ of certiorari by deciding itself whether the Board's decision is supported by substantial evidence. This Court has refused consistently since at least 1951 to engage in such exercises. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951) ("Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has

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NLRB, No. 87-3801 (4th Cir. October 28, 1987), *reh'g denied*, No. 87-3801 (December 11, 1987). The Fourth Circuit failed even to acknowledge the existence of, much less decide, these two critical issues, notwithstanding the fact that a valid union majority finding is a jurisdictional prerequisite for issuance of a bargaining order. *See Conair Corp. v. NLRB*, 721 F.2d 1355, 1384 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984); *Gourmet Foods, Inc.*, 270 N.L.R.B. 578, 116 L.R.R.M. 1105 (1984).

[2] In attempting to cure the Board's failure to address and evaluate in its decision the evidence tendered to the agency by Koons Ford on the turnover in management and ownership issues, the Solicitor General—not referring to the Board's decision, but citing previously ignored evidence contained in affidavits included in the Joint Appendix submitted to the Court of Appeals—now seeks before this Court to engage in an impermissible *post hoc* evaluation of such evidence as a supporting basis for the Board's order. *See* NLRB Brief at 11, lines 15-23. The Fourth Circuit specifically determined that the Board had failed to address these issues; therefore, such issues "involve[d] unresolved questions of fact." (A-5).

placed in the keeping of the Courts of Appeals."); *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951) ("This is not the place to review a conflict of evidence. . . .")[3]. Accordingly, the Board's attempt to support enforcement of the bargaining order by urging this Court to engage in *de novo* substantial evidence review should be rejected. *See NLRB v. Pittsburgh Steamship Co.*, 340 U.S. at 502 ("Were we called upon to pass on the Board's conclusions in the first instance . . . we might well support the Board's conclusion. . . . But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for [reviewing] Labor Board orders.").

III. The Fourth Circuit's Sole Rationale For Enforcement Of The Bargaining Order Conflicts Directly With Decisions Of Other Courts Of Appeals And Constitutes A Radical Departure From The Accepted And Usual Course Of Judicial Review

The Fourth Circuit clearly relied exclusively upon a negotiated settlement agreement—approved by the NLRB without findings of wrongdoing and expressly providing for *no* admission of guilt by Koons Ford—to make an original finding of "unclean hands" against Koons Ford and, therefore, to enforce the bargaining order. (A-5-6). Such finding of "unclean hands" against a party to a Board-approved settlement with a nonadmissions clause —essentially equivalent to the imputation of guilt—conflicts with decisions of the Sixth and Tenth Circuits. *See NLRB v. Bangor Plastics, Inc.*, 392 F.2d 772, 775

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[3] *See also American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 522-23 (1981) ("Since the [Occupational Safety and Health] Act places responsibility for determining substantial evidence questions in the courts of appeals, . . . our inquiry is not to determine whether we, in the first instance, would find OSHA's findings supported by substantial evidence."); *FTC v. Standard Oil Co.*, 355 U.S. 396, 400-01 (1958) ("We do no more on the issue of [substantial evidence] than decide [whether] the Court of Appeals has made a 'fair assessment' of the record.").

(6th Cir. 1967) ("A settlement agreement does not amount to a finding or admission that respondent has committed an unfair labor practice. . . ."); *W.B. Johnston Grain Co. v. NLRB*, 365 F.2d 582, 587 (10th Cir. 1966) ("It is true that the settlement agreement was not an admission that the Company had been guilty of an unfair labor practice. . . ."). The Fourth Circuit's radical and fundamental departure from existing settlement law, in which the Court simply ignored the well-established proscriptions of Federal Rule of Evidence 408,[4] and engaged in impermissible appellate fact-finding reserved by statute for the Board in a proper remand proceeding,[5] virtually compels an exercise of this Court's supervisory power.

The Board does not challenge Koons Ford's pronouncements of law and policy on the sanctity and importance of settlement agreements. Instead, the Board engages in a semantical characterization of the Fourth Circuit's decision in an attempt to avoid this Court's review. Specifically, the Board urges:

> [T]he court below did not use the settlement to "impute guilt" to petitioner. It merely concluded that the existence of a settlement, and the unfair labor practice charges underlying it, made it appropriate not to require a new evidentiary hearing to enable petitioner to show that post-hearing events had made a fair election possible.

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[4] Assuming *arguendo* that the Court of Appeals could make *de novo* findings of fact, its fact-finding is subject to the Federal Rules of Evidence. Fed. R. Evid. 1101(a).

[5] The National Labor Relations Act ("Act"), commits the fact-finding function to the NLRB. *See* 29 U.S.C. § 160(b) and (c). Where the taking and consideration of additional evidence not in the agency record presented on appeal is deemed appropriate, the Act instructs the reviewing court of appeals to remand the case to the NLRB to allow the agency to make the necessary findings. *See* 29 U.S.C. § 160(e).

NLRB Brief at 12. Contrary to this attempted obfuscation, the Fourth Circuit was clear and direct in enunciating its only rationale for enforcing the bargaining order:

> [W]e have reviewed in this appeal the record in the other [settled] proceeding between the parties. It is obvious that Koons Ford cannot meet the "clean hands" requirement as a condition for objecting to the bargaining order in this case.

(A-6). Upon review of this plain language of the Court's opinion, there can be no rational argument that the Fourth Circuit did not impute guilt or "unclean hands" to Koons Ford on the sole basis of having reviewed the negotiated settlement agreement in the separate Board proceeding between the parties.[6]

The Solicitor General, after inconsistently admitting that the Fourth Circuit determined Koons Ford "did not have 'clean hands'," NLRB Brief at 11, then resorts to a lengthy *post hoc* rationalization seeking to demonstrate that the lower Court's "conclusion was eminently sensible. . . ." NLRB Brief at 12, lines 15-29. The Fourth Circuit, of course, did not explain, or cite any support for, its radical and fundamental departure from well-established settlement law.[7] The Solicitor General similarly fails to justify, or cite any support for, ignoring

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[6] In a moment of candor, and contrary to its advocacy, the Board inconsistently admits elsewhere in its brief the accuracy of Koons Ford's position:

> The court below rested its judgment . . . on the . . . ground that petitioner did not have "clean hands" . . . because in fact unfair labor practice charges . . . had been filed against petitioner and settled by an [agreement] approved by the Board . . . .

NLRB Brief at 11-12.

[7] The Board did not raise the "settlement agreement" issue before the Fourth Circuit Court until oral argument. (A-6). In declining to rule on the fully-briefed issues presented for review, the Court, without notice and without seeking the benefit of supplemental briefing on point by the parties, enforced the bargaining order solely on the basis of its unclean hands finding.

well-established settlement law in an attempt to rationalize the Court's "unclean hands" finding. Indeed, there is none.

The Solicitor General suggests (1) that "the settlement did not insulate the post-hearing events from any possible consideration in connection with determining the appropriateness of a bargaining order[,]" and, in a state-of-mind assertion, (2) that "the court knew that at any reopened hearing the claim of no 'evidence * * * of anti-union animus' would be swiftly dashed." NLRB Brief at 12. These *post hoc* assertions have no merit.

The Board has long held that a settlement agreement is not competent evidence that an employer bears anti-union animus.[8] Moreover, neither the settlement agreement nor the Board's order approving the settlement contains any findings of wrongdoing against Koons Ford, or that any of the events alleged in the unfair labor practice charges actually took place. Finally, the agency "record" of the settled proceeding referred to by the Fourth Circuit (A-6), and the Board, NLRB Brief at 12, by agreement of the parties consists *only* of the settlement agreement, the charges and amended complaint, and a conforming procedural order of an Administrative Law Judge. *See* Settlement Stipulation at Paragraph 6. (A-9). Thus, even assuming *arguendo* that it is permissible to review the record of the settled proceeding in search of some inference of unclean hands or anti-union animus, the defined record of the settled proceeding contains no evidentiary materials or conclusions to support any such inferences.

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[8] *See Southwest Chevrolet Corp.*, 194 N.L.R.B. 975, 79 L.R.R.M. 1156, 1158-59, *enf'd*, 82 L.R.R.M. 2620 (7th Cir. 1972); *Mason & Hanger-Silas Mason Co.*, 167 N.L.R.B. 894, n.1, 63 L.R.R.M. 1208 (1967), *enf'd*, 405 F.2d 1 (5th Cir. 1968); *Poray, Inc.*, 143 N.L.R.B. 617, 620, 53 L.R.R.M. 1373, 1374-75 (1963), *petition denied*, 337 F.2d 114 (D.C. Cir. 1964).

IV. The Fourth Circuit Improperly Enforced The Bargaining Order Solely On Grounds Never Considered Or Invoked By The Board

The rationality of the NLRB's bases for decision and the substantiality of evidentiary support were not assessed by the Fourth Circuit. Instead, the lower Court enforced the bargaining order solely on the basis of its review of a settlement agreement and its consequent finding of unclean hands against Koons Ford—"evidence" and grounds never considered or invoked by the Board. Contrary to the assertion of the Board, NLRB Brief at 12-13, the Fourth Circuit's flagrant departure from established law on the proper scope of judicial review constitutes a classic violation of the principles enunciated by this Court in *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.").

The *Chenery* doctrine has assumed its proper place as "bedrock" law and this Court has insisted repeatedly and consistently on adherence to its precepts.[9] Koons Ford similarly seeks this Court's review to correct the Fourth Circuit's egregious abuse of the *Chenery* doctrine.[10]

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[9] *See, e.g., Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 50 (1983); *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 538-540 (1981); *Federal Power Commission v. Texaco, Inc.*, 417 U.S. 380, 397 (1974); *NLRB v. Food Store Employees*, 417 U.S. 1, 9 (1974); *Gulf States Utilities Co. v. Federal Power Commission*, 411 U.S. 747, 764 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971).

[10] The Board inconsistently acknowledges the error of the Fourth Circuit, admitting "it might be said that the court gave excessive weight to the existence of post-hearing charges in concluding that a reopened hearing would be futile." NLRB Brief at 13. Despite crafting its admission to understate the egregious error of the lower Court, the Board cannot obscure the fact that the Fourth Circuit enforced the bargaining order solely on "evidence" and grounds never considered or invoked by the Board.

The Board finally suggests that, notwithstanding the Fourth Circuit's *Chenery* error, this Court's review and supervision is not warranted because the lower Court's opinion is unpublished. NLRB Brief at 13. This assertion has no merit.

The fact that the challenged Fourth Circuit order is unpublished should carry no weight in the Court's decision to review the case. *See Commissioner of Internal Revenue v. McCoy*, 108 S. Ct. 217, 219 (1987). The Solicitor General's attempt to diminish the compelling need for this Court's review by urging merely that the Fourth Circuit's decision is unpublished rings hollow. In a July 1987 petition for writ of certiorari on behalf of the Commissioner of Internal Revenue in *McCoy*, the Solicitor General successfully sought this Court's review of an unpublished Sixth Circuit Court decision, urging "[W]e do not think that a court should be permitted to ignore [the law], whether or not it chooses to publish its decision." Petition For A Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit at 14, *Commissioner of Internal Revenue v. McCoy*, 108 S. Ct. 217 (1987).[11]

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[11] Moreover, it cannot be argued that the precedential effect of the Fourth Circuit's decision is negligible merely because it is unpublished. Several circuit courts permit citation to unpublished decisions as precedential authority in varying circumstances. *See, e.g.*, 4th Cir. I.O.P. 36.5 ("If counsel believes . . . that an unpublished disposition of any court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court."); 6th Cir. R. 24(b) (to same effect as Fourth circuit I.O.P.); 7th Cir. R. 28(d) (no restriction on citation; merely must attach copy of unpublished decision to document). Due to the highly irregular analysis and result reached by the Fourth Circuit, the Board and other litigants in future proceedings could cite the lower Court's opinion with confidence that no published decision of equivalent precedential value exists.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the petition for writ of certiorari, Koons Ford of Annapolis, Inc. respectfully requests this Court to issue a writ of certiorari to review the decision of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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